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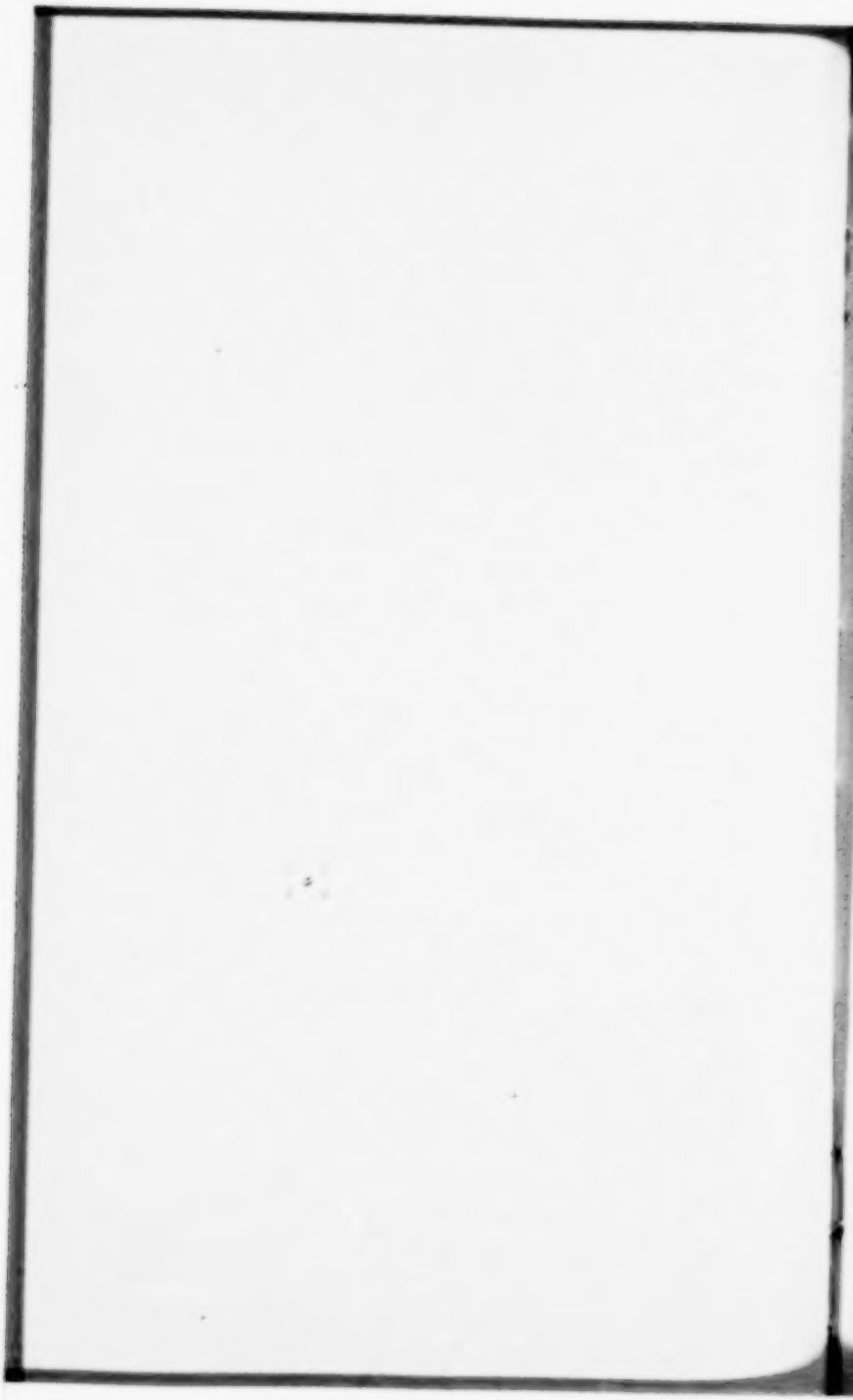

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

Pleas and Proceedings had and done at a Regular Term of the Distirct Court of the United States for the Jackson Division of the Southern District of Mississippi, begun and held in the City of Jackson, Mississippi, on the 3rd day of May, A. D. 1920, that being the regular time and place designated by law for holding said Court. Present and Presiding the Honorable Edwin R. Holmes, United States District Judge, Hon. J. P. Alexander, United States District Attorney for said District, Hon. Floyd Loper, United States Marshal, and Jack Thompson, United States District Clerk, and W. L. Hemingway, Court Crier. Among the proceedings had and done were the following, to-wit:

IN THE

District Court of the United States

IN AND FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AT JACKSON.

R. E. Kennington, The R. E. Kennington Company, and the Union Department Store vs. A. Mitchell Palmer, et al.

ORIGINAL BILL OF COMPLAINT.

Comes the R. E. Kennington Company and the Union Department Store, corporations organized under the laws of the State of Mississippi, and domiciled at Jackson, in the First Judicial District of Hinds County, Mississippi, and R. E. Kennington, an adult resident of the City of Jackson, in the First Judicial District of Hinds County, Mississippi. The said R. E. Kennington is President of the R. E. Kennington Company and the Union Department Store, defendants herein. He holds and owns the majority of the stock of said corporations, and is the executive head of such corporations, and determines the policies of such corporations, and actively directs the management thereof. In addition thereto, he is the owner of a department store in Yazoo City, Yazoo County, Mississippi, which he manages.

A. Mitchell Palmer is a resident of the State of Pennsylvania; that he is the Attorney General of the United States, with his official residence at Washington, D. C.

That H. E. Figg assumes to act as United States Fair Price Commissioner, with his official residence in Washington, D. C.

That T. J. Locke, an adult resident of Lowndes County, Mississippi, assumes to act as State Fair Price Commissioner for the State of Mississippi.

That S. J. Taylor, an adult resident of Jackson, in the First Judicial District of Hinds County, Mississippi, assumes to act as Fair Price Commissioner for the City of Jackson, under the authority hereinafter set out.

That Julian Alexander, an adult resident of the City of Jackson, in the First Judicial District of Hinds County, Mississippi, is the United States District Attorney for the Southern District of Mississippi.

That H. M. Fulgham, an adult resident of the City of Jackson, in the First Judicial District of Hinds County,

Mississippi, is the Assistant United States District Attorney for the Southern District of Mississippi.

For cause of action the complainants show unto the court the following statement of facts:

(1) That the amount and value here in controversy, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars of lawful money of the United States.

(2) That jurisdiction of this cause exists in this court, in that it involves a Federal question, arising upon and out of the construction of the statutes of the United States, of the Constitution of the United States, its several amendments passed in pursuance thereof; the rights, privileges and immunities sought to be derived from the said Constitution, statutes and authorities by the parties hereto, and this jurisdiction is based upon the following:

(a) The construction of Article 1, Section 1, wherein all legislative power then granted was vested in the Congress of the United States.

(b) Article 1, Section 8, whereunder Congress is given power under sub-division 5 thereof to coin money, to regulate the value thereof and of foreign coins.

(c) Article 1, Section 8, whereunder Congress is given power under sub-division 11 thereof to declare war.

(d) Article 1, Section 8, whereunder Congress is given power under sub-division 18 to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States.

(e) Article 3, Section 2, whereby the judicial power under sub-division 1 is vested in the courts of the United States in all cases brought in law and in equity arising under said Constitution and the laws of the United States.

(f) Article 4, Section 4 thereof, whereunder the United States is required to guarantee every state in this Union a republican form of Government.

(g) Article 6, Section 2 thereof, whereunder it is declared this Constitution and the laws made in pursuance thereof become the supreme law of the land.

(h) The Fourth Amendment thereof, whereunder the right of the people to be secure in their persons,

houses, papers and effects against unreasonable searches and seizures is guaranteed.

(i) Amendment Fifth thereof, whereunder no person shall be deprived of life, liberty or property without due process of law.

(j) Amendment Fifth thereof, whereunder no person shall have his private property taken for public use without just compensation.

(k) Amendment Sixth thereof, whereunder, in all criminal prosecutions, the accused shall enjoy right to speedy and public trial by an impartial jury of the State and district, and to be informed of the nature and cause of the accusation against him, and to be confronted by witnesses.

(l) Amendment Ninth thereof, whereunder it is declared that the enumeration in said constitution of certain rights shall not be construed to deny or disparage other rights retained by the people, and not delegated to the United States.

(m) And, further, involves the construction of that certain Act of Congress passed upon the 10th day of August, 1917, entitled "An Act to provide for the National Security and Defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel; and

(n) The amendment thereof passed by the Congress upon the 22nd day of October, 1919, entitled "An Act to amend an Act entitled 'An Act to provide further for National security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel, approved August 10, 1917, and to regulate rents in the District of Columbia' "; and

(n) Divers and sundry assumed powers and prerogatives arrogated to said respondents other than said Alexander and said Fulgham, by an alleged and pretended interpretation of the privileges and prerogatives conferred under said several acts.

(3) Complainants show unto the Court that the R. E. K[illegible]ngton Company, one of the complainants herein, now operates, and for many years has operated, in the City of Jackson, Mississippi, a high grade department store, and in said department store carries many lines of

merchandise, which it sells in the City of Jackson, and throughout the State of Mississippi, at retail and at wholesale. That during the years of its operation, by reason of the matters and facts hereinafter alleged, it has built up a very large business, which has been in the past fairly remunerative, and it is the desire and intention of the owners and operators thereof to continue to operate it on such basis in the future, unless prevented by the wrongful, harmful and injurious activities of the defendants. The Union Department Store, and R. E. Kennington's business at Yazoo City are, and have been, operated on the same basis.

(4) Complainants show unto the Court that in order that said business should be efficiently, properly and profitably conducted, in order that it may serve its proper function in the community where located, and throughout the State, as a medium of service for the purpose of furnishing to its customers merchandise at fair and reasonable prices, it is necessary for it to incur enormous expense and large financial responsibilities. That in order to ascertain the wishes and tastes of its patrons and customers, and to serve satisfactorily such wants, desires and requirements, they maintain in the City of Jackson two large stores and one in Yazoo City, a large number of clerks, employees and salesmen, and through the medium of the newspapers, advertise its facilities for supplying the requirements of the public. It not only does that, but in order to anticipate and satisfy the demands, requirements, tastes, and even whims of the public, it maintains an office in the City of New York, State of New York, as well as a connection in Paris, France, in order that it may keep in constant touch with the markets of the world. It keeps in the market for such purposes, and at great expense, a large number of buyers of merchandise. It not only does that, but it is necessary for the said complainants, at all times, to have on hand a large and expensive stock of all kinds of merchandise, which includes, among other things, what is known as wearing apparel. That it is necessary for it to incur large obligation for borrowed money, and for goods purchased upon credit in the usual course of business. That it is necessary for it, in the usual course of business to extend credit to its customers for large sums of money. That the operation of such business is attended with varied hazards and risks requiring the exercise of the greatest care and skill and judgment. To illustrate, the complainants

may purchase a line of dresses, of colors, plates and designs to suit the desires, tastes and whims of their customers; or an assortment of shoes for similar purpose, as well as many other articles of merchandise, not necessary to enumerate, and as soon as such articles have been placed in complainants' store, the tastes, desires and whims of their customers may undergo a change, or the styles may change, whereby complainants sustain a loss in that such merchandise will have to be sold for whatever it may bring.

(5) Complainants show unto the Court that by the strictest attention to business and highest efficiency, and by practicing a course of uniformly fair treatment towards the public, complainants built up in the State of Mississippi a reputation as vendors of high grade merchandise and for fair and honest dealing, and that such reputation forms a part of its business, is what is known as their good-will, and is property to the complainants.

(6) The complainants show unto the Court that beginning with the year 1914, at the outbreak of the world war, prices of foodstuffs, wearing apparel and other commodities have greatly enhanced in price; that a number of things have contributed to bring about this result:

(a) The Federal banks of this country, created and operated under the acts of Congress in order that the enormous business of the country might be carried on under the prevailing prices, have issued enormous volumes of currency, which has had the effect of making money cheap, in that the purchasing power of money has thereby been greatly reduced and diminished.

(b) A large portion of the man-power, that is to say, the producing power of the country, the young men of the country, went into the army and into foreign countries, and the productive activity of the country has been deprived of the result of their labors. The importation of foreign labor into this country, on account of the war, and during the period thereof, almost totally ceased, so that the production of the country was greatly diminished.

(c) The production of other countries was diminished by reason of the war to even greater extent, and it has been necessary that all kinds of merchandise, supplies and foodtsuffs be exported to other countries, by reason of all of which, and according to the law of supply and

demand, contributed to by the diminished purchasing power of money, as aforesaid, the prices of all kinds of merchandise, including foodstuffs and wearing apparel, have many times increased in value.

(d) This condition has been greatly enhanced and exaggerated by reason of the enormous increases in wages and abundance of money in circulation, which have been made by reason of the operation of the war, and the reckless expenditures which have followed in the wake of such conditions.

(7) The prices of all kinds of merchandise and commodities, for the reasons hereinbefore set out, have increased so in price that Congress passed certain legislation with a view to alleviating conditions brought about as the result of the prices aforesaid. That upon October 22, 1919, it passed an Act amending Section 1 of the Act of August 10, 1917, making the same to read as follows:

> "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation and private controls affecting such supply, distribution and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes, the instrumentalities, means, methods, powers, authorities, duties, obligations and prohibitions hereinafter set forth, are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

The result, and apparent purpose and effect of said amendment was to include among the articles designated

in said articles as necessary "wearing apparel," which, in the Act, originally passed had not been so designated.

In and by Section 2 of said Act, approved October 22nd, 1919, Section 4 of said Act of August 10, 1917, was amended to read as follows:

"That it is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to permit waste or wilfully to permit preventable deterioriation of any necessaries in or in connection with their production, manufacture or distribution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit or lessen the manufacture or production of necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this Section. Any person violating any of the provisions of this section, upon conviction thereof, shall be fined not exceeding $5,000.00, or be imprisoned for more than two years, or both: Provided that this section shall not apply to any farmer, gardner, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided further, that nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardners, or other producers of farm products produced or raised by its members upon lands owned, leased or cultivated by them."

(8) That notwithstanding the provisions of the first section of said act quoted above, that "The President is

authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act," no such regulations have been made, and no such order, or orders, issued, either by or for the President, or otherwise, or at all; and, in respect to the sale of wearing appared, no prices, rates and charges whatsoever have been fixed, either by the President or on his behalf, or by any official body or agency, or otherwise, or at all, for the guidance of persons handling or dealing in the same; nor have any steps been taken to do so.

Complainants show unto the court that one, T. J. Locke, one of the defendants herein, assuming to be the Fair Price Commissioner of the State of Mississippi, and assuming to act under the Act of Congress hereinbefore referred to, has purported to fix maximum margin of profits on wearing apparel and merchandise throughout the State of Mississippi; that the said Locke has issued a declaration, in which he purports to set out the maximum margin of profit to be charged by merchants for wearing apparel in the State of Mississippi; that the said proclamation is in words and figures as follows, to-wit:

"Fair Price Committees are advised that the Commissioner for Mississippi has this thirtieth day of April fixed and does hereby promulgate the following maximum prices and maximum margins of profits which a retail merchant handling the following named articles of merchandise may charge, and these prices and margins of profit are based on actual, original cost, plus freight or express and war tax, and they are maximum; merchants may sell for less.

Men's and boys' suits, costing up to $25, margin of profit 33 1-3 per cent; costing from $25 to $50, inclusive, margin of profit 35 per cent. The commissioner fixes no margins on suits costing merchant above $50.

Ladies' and misses' suits and dresses, same margin of profits as on men's and boys' suits.

Men's, ladies' and children's shoes, costing up to $3, margin of profit 25 per cent; costing from $3 to $8, margin of profit 30 per cent; costing from $8 to $10, inclusive, 33 1-3 per cent. The commissioner fixes no margin on shoes costing merchant above $10.

Men's and children's hats: Costing up to $5, margin of profit 30 per cent; costing from $5 to $10, inclusive, 40 per cent; all straw hats, margin of profit 40 per cent. No margin fixed on hats costing merchant above $10.

Ladies' and misses' hats: Costing up to $5, margin of

profit 30 per cent; costing from $5 to $10, margin of profit 40 per cent. No margins fixed on ladies' hats costing merchant above $15.

Dry Goods: The margin of profit on all staple dry goods is 33 1-3 per cent; the margin of profit on all fancy dry goods is 40 per cent.

Men's Collars: The maximum price which may be charged for men's stiff collors (standard brands) is 25c.

Complainants show unto the Court that the said Locke, who assumes to be Fair Price Commissioner for the State of Mississippi, purporting to act under the Acts of Congress hereinbefore referred to, has appointed, or caused to be appointed, S. J. Taylor as chairman of the Fair Price Committee for the City of Jackson Mississippi, and the said S. J. Taylor has assumed the duties as such, and has approved the margin of profit for retail merchants in the State of Mississippi, set forth herein as made by the said Locke.

Complainants show unto the Court that the said Locke, assuming to act as State Fair Price Commissioner, and the said S. J. Taylor, assuming to act as Chairman of the Fair Price Committee for the City of Jackson, have notified the complainants of the maximum margins of profit fixed by the Fair Price Commissioner for the State of Mississippi, by sending copies thereof to the said complainants, and by notifying the said complainants that complainants will be expected to receive and charge no higher profit upon the sale of any merchandise than is provided by such declaration.

(9) The said S. J. Taylor, purporting to act as Chairman of the Fair Price Committee for the City of Jackson, called at the store of the complainant, the R. E. Kennington Company, examined various articles of wearing apparel, and demanded of complainants that invoices for the same be furnished to him in order that he might ascertain as to whether or not the margin of profit had and received by the said R. E. Kennington Company exceeded the margin of profit fixed by the said State Fair Price Commissioner; that the object and purposes of the said S. J. Taylor was to secure the invoices for wearing apparel offered for sale by the said complainant, to compare the same with the selling price, and if the margin of profit in any case exceeded that allowed by the State Fair Price Commissioner, to take steps to secure criminal prosecution against the said complainants, or either or both of them, claiming that the complainants violated the Act

of Congress in failing and refusing to conform to the margin of profit fixed by the State Fair Price Commissioner, if any such variation should be shown to exist.

Complainants show unto the Court that under the Constitution of the United States, neither the State Fair Price Commissioner, nor the Fair Price Committee for the City of Jackson, had any authority to demand or require any invoices, or other papers or documents of and from the complainants touching the cost of said merchandise, or any part thereof.

(10) Complainants show unto the Court that upon various and sundry days and dates subsequent to the issuance of such declaration of prices by the said Locke, Fair Price Commissioner of the State of Mississippi, as is hereinbefore set out, the said Locke and the said Taylor have been pursuing a system of espionage by sending various persons into the store of the said R. E. Kennington Company to purchase various articles of wearing apparel, have sought thereby to obtain evidence against the complainants that wearing apparel was being sold in said store for a higher basis of profit than that fixed in the declaration of the State Fair Price Commissioner; and these complainants allege and aver that it is the intention of the said Taylor and the said Locke, and the said Alexander, District Attorney, and the said Fulgham, Assistant District Attorney, at the approaching term of the United States Court for the Southern District of Mississippi, at Jackson, to secure an indictment, or indictments, against the complainants, or either or all of them, for various and sundry sales, upon various and sundry dates, alleged and claimed by them to have been made by the complainants for a basis of profit in excess of the maximum profits fixed by the State Fair Price Commissioner.

Complainants show unto the Court that they are in no manner responsible for conditions which produced the inflated prices as aforesaid, but they are brought about by conditions over which they have absolutely no control; that the complainants conduct their respective businesses just as they have always done, without attempting to obtain an average higher margin of profit than they did obtain prior to the war, and such as will yield a fair and reasonable net profit.

Complainants show unto the Court that a large amount of the merchandise sold by them, and each of them, from their respective stores, including wearing ap-

parel, is sold for less than the margins of profit fixed as aforesaid; that they are constantly required and forced to sell many articles of merchandise, including wearing apparel, for less than the original primary cost thereof, on account of change in styles, tastes, whims and caprices of customers, and for various and sundry reasons which will be made apparent herein.

Complainants show unto the Court that the said T. J. Locke, who is assuming to act as Fair Price Commissioner for the State of Mississippi, has had no experience in operating a department store; that he is engaged solely in the wholesale grocery business, and is utterly ignorant of the essential elements which enter into the proper conduct of said business; that in his own business of wholesale grocer, in which he sells foods and the necessaries of life, he is not observing, or pretending to observe, the maximum margins of profit which he is endeavoring as hereinafter set out to coerce merchants in the State of Mississippi to submit to. That S. J. Taylor is not engaged in the department store, dry goods, or wearing apparel business, and has not been for ten or fifteen years; that he is utterly unfamiliar with such business, and has no accurate knowledge of the conditions under which the same is operated, or the essential elements which enter into the fixing of a fair and reasonable margin of profit therefrom; that the said S. J. Taylor is engaged in the wholesale grocery business, selling the necessities of life, in the City of Jackson, Mississippi, and the business owned and conducted by him does not pretend in any manner to conform to the maximum margins of profit fixed for such business by the State Fair Price Commissioner.

Complainants show unto the Court that their respective places of business constitute no monopoly in any sense, but there are an abundance of department stores similar to theirs, all in competition with one another, striving to supply the requirements of the trade.

Complainants show unto the Court that in each of the departments of each complainant wherein no change in stock is requisite to co-ordinate it with the whims of fashion, and to obviate other extraordinary conditions, complainants have always, are now, and will continue to ask, a profit less than that assumed to be established by respondents. In divers of their departments, more especially millinery and women's ready-to-wear, there are constantly changing modes, to comply wherewith in-

volves the rendition of an additional service by complainants, wherefor reasonable compensation must be made, as each of said departments should, to them have allocated all expenses therein incurred. As to said departments there are published in New York, Paris, and elsewhere certain illustrated magazines purporting to give in advance the styles which publications circulate among complainants' patrons, and which are conflicting and confusing in the extreme. In order to render this service, complainants must buy in advance, utilizing their office in New York, Paris, and other means hereinafter set out therefor. A rare ability, commanding a large salary, is required by those in position to anticipate the vogue at a future date, and to select those articles which, in addition to being a hat or a dress, will embody style, and to that end complainants are expending large sums in foreign markets where such things are first displayed, diligently endeavoring to winnow out of the variegated conglomerations, that which will possess style, and which will at a future date appeal to feminine fancy.

That between producers of this merchandise the output is not uniform, each several producer seeking for personal aggrandizement to individualize his output so as to make this individualism the vogue, and should any such individual'sm be ignored by complainants and thereafter become the vogue, the penalty would be the loss of the patronage of this class of buyers and the serious impairment of complainants' good will. In said business there is a great money risk in operating a style shop. In order to render this service, which is separate and apart from selling goods as goods, and which alone respondents have considered, it is essential that there be added to the actual out-of-pocket cost the following, which respondents have wrongfully ignored:

(a) Actual cost of going to, remaining at, and keeping in touch with the market, and every part thereof.

(b) Adequate high salaries commensurate with this class of ability.

(c) Actual buying in advance of that which is hoped to be stylish and disposing thereof in due course.

(d) Being luxurious and near luxuries, a forecasting of the ability of its purchasers to buy, predicated upon the condition in this section of the cotton crop.

That complainants' businesses in these departments

are with women, who have very definite opinion of that which is stylish, predicated upon the aforesaid publications and divers others, and should complainants procure in advance styles that would not be worn they would be absolutely unsalable, and that which the public demands of complainants is that they offer for sale that which is stylish when it is stylish, and that respondents have placed this service and the goods themselves upon the same selling basis as those goods which are sold to complainants over the counter, and complainants over that wrongfully respondents have assumed to take jurisdiction over the complete field covered by that which is denominated "wearing apparel," embracing the furnishing of style, and have wrongfully assumed to place the business of complainants under their jurisdiction, and it is only by having what these followers of fashion are willing to buy when they want to buy it that complainants can stay in business. And that those desiring to buy a hat as a hat, or a dress as a dress, sans style, are able to get the same at a price less than the original cost of acquisition to complinants, while those who insist upon having a hat plus style, and a dress plus style, are willing to and must be willing to pay a sufficient amount to allow the dealer therein trafficking to earn a profit therefrom, and complainants aver that said respondents have no power to control the prices paid for the rendition of said service in furnishing style in said several departments; but, notwithstanding this, have wrongfully assumed jurisdiction thereover and are holding complainants up as profiteers to the public, when they are performing this service and charging therefor that which the public is willing to pay, and over which service said respondents are wholly without jurisdiction. Said goods so offered are not in any wise affected with a public use, and the acquisition of such commodities, plus the style, is merely the gratification of a feminine whim, and respondents are wholly without power, despite their acts to the contrary, to take from these complainants for the private gratification of the fancy of their customers their private property without just compensation for private use. An analysis of each of these sales shows that there is a sale by complainants of the actual goods made, and also the sale of a rendition of a service which, as a completed whole is requisite in each of these departments, and the right thus to sell style when disposing of the materials expressing it, is a property right wherein complainants have invested large

amounts of money and which cannot from them be taken contrary to the Federal Constitution.

Complainants further aver that they are entitled to indemnification against the loss irretrievably incident to such a business, and in being a purveyor of style must be allowed to dispose of those commodities that do not express it at a loss that must be allocated against the purchase price of the goods sold; and that when thus conducted the business yields only a reasonable profit in some stores, and in others almost none.

Complainants aver that the United States has no authority over the selling price of any of said commodities so now localized in and become a part of the mass of property, and said business is done with reference to a class of commodities whereover the United States is, as to said luxuries and near luxuries, wholly without power to take jurisdiction, as they do not in any way come within the war power of said Government.

Complainants aver that said respondents further violated the provisions of the Constitution and of said statute, in this: that the complainants are the owners of d'vers commodities purchased outright, and the price thereof in open market has so materially advanced as that the replacement value thereof is greater than the price at which complainants are selling the same at retail; and yet said respondents are seeking to compel complainants to dispose of their private property at prices which are less than said replacement value, and thus give to customers the uplift which has accrued to complainants by reason of its property.

Complainants further aver that they are vested with a right to convert their property at the reasonable wholesale value plus a reasonable retail profit thereon. That they are in business to stay. Due to the possession of a stock of goods wherein there has been an uplift a large amount of paper profits apparently have accrued to complainants, but this must be set aside as a reserve to absorb the loss which will inevitably occur due to the possession of a similar stock of goods when the prices of such goods purchased at the present abnormal cost have again returned to their former levels; and complainants are entitled to retain this apparent paper profit as a reserve against said decline, and should the demands of respondents be complied with by a conversion at the prices fixed the result will be the destructions of complainants' businesses, and when the abnormal prices are restored that

apparent uplift in values will be completely eliminated, and complainants will be possessed of but a stock of goods. Complainants are but taking from their businesses an amount equal to their normal profits, leaving said paper profits apparently accruing to continue in the business to insure its solvency, which will be destroyed if compainants are not vouched safe the rights herein sought.

Complainants charge and withdraw from their business only the amount which it is proper to withdraw for the rendition of a service as a distributor and not the apparent amount represented by said paper uplift in values.

That the said United States Government and said respondents have no jurisdiction whatsoever over luxuries and near luxuries, wherein complainants deal; but notwithstanding said want of power, said respondents have wrongfully assumed jurisdiction over complainants' businesses with reference thereto, and will, unless restrained, continue so to exercise said trespasses, as hereinbefore set out, as to deprive complainants of their constitutional rights.

(11) The complainants show unto the Court that neither the Fair Price Commissioner for the State of Mississippi, nor the chairman of the Fair Price Committee for the City of Jackson, has any right or authority under the Constitution and laws of the United States to determine, or fix, or proclaim the profits at which the complainants shall sell their wearing apparel or any of their merchandise, and that such assumed exercise of authority is wrongful, unlawful and arbitrary, and an unwarranted assumption of power and authority, and an unwarranted and unlawful invasion of the lawful rights of complainants in the following respects, to-wit:

(a) The complainants do not manufacture merchandise or wearing apparel which they sell or offer for sale; they are distributors of merchandise only. There is no contention or claim on the part if the defendants, or any of them, that there is any combination in restraint of trade between the complainants and their competitors. There is, and will be, no claim on the part of the defendants that the goods sold by the complainants are sold under any agreement, express or implied, with their competitors as to the prices to be charged. Upon the other hand, complainants allege and aver that the sharpest competition exists between the complainants and mer-

chants engaged in a similar line of trade in the City of Jackson, and elsewhere throughout the State of Mississippi, and such prices as are charged by the complainants, as well as other merchants in the City of Jackson, and throughout the State of Mississippi, are the result of open and keen competition, and are the result of the law of supply and demand.

Complainants show unto the Court that they are citizens of the United States within the meaning of the Constitution and laws thereof; that they have the right to buy goods and to sell the same at a profit, provided the price charged is not the result of any unlawful agreement or combination, and complainants allege and aver that no such combination or agreement exists, or ever existed, and none will be claimed by the defendants; and the Congress of the United States has no right, nor has the State Fair Price Commissioner, or Taylor, the City Fair Price Commissioner, any kind of power or authority to fix or determine the amount of profit which the complainants shall have or receive upon a re-sale of their goods; that the right of the said complainants to purchase goods in the open market and to sell the same in the regular course of business at such price as will yield a fair and reasonable profit as a result of free and open competition and in the absence of combine or agreement in restraint of trade is property, in the enjoyment of which they are protected by the Constitution of the United States, especially the Fifth Amendment thereto, and that portion thereof providing that persons shall not be deprived of their property without due process of law, and that they shall not be denied the equal protection of the law.

Complainants, therefore, allege and aver that the said Fair Price Commissioners are without authority or power to fix, or attempt to fix, the profit which they shall enjoy or receive from such sale, for the reason that the pretended Act of Congress hereinbefore set out is void and without effect, in that the same is in violation of the Constitution of the United States, as hereinbefore alleged.

(b) Complainants show unto the Court that said Act of October 22, 1919, being an Act amendatory to the original Lever Act, purported to be enacted as a war time measure. Complainants show unto the Court, however, that the war between the United States and its allies and

Germany terminated in October, 1918, that the military and naval forces of the United States and its allies began to demobilize soon thereafter, and upon October 22, 1919, the military forces of the United States were practically demobilized, and the United States Government upon October 22, 1919, had ceased all war activities, and it had discharged the Committee charged with the duty of fixing the price of coal, had turned back to the owners thereof the telegraph and telephone companies, and was ready to turn back to the owners thereof the railroads, which it has done since, as a matter of fact; if war existed at all between the United States and Germany on October 22, 1919, it existed only in theory and not in fact.

And complainants further show unto the Court that the passage of said Act of October 22, 1919, had no reference or relation, either near or remote, direct or indirect, to any state of war which may have existed, either in fact or theoretically, at the time of its passage, and Congress was without power and authority under the laws and Constitution of the United States after the termination of such war to pass any such act, and certainly without power and authority to pass an act dealing with wearing apparel, which, upon October 22, 1919, could have absolutely no relation or bearing upon such state of war as may have existed. In other words, these complainants allege and aver that upon October 22, 1919, and at all times since said date, so far as the carrying on of war between the United States and Germany is concerned, if any such war existed, either theoretically or as a matter of fact, the price which the complainants might charge for a gingham dress, or a pair of high heel shoes, a gentleman's collar, a crepe de chine lady's dress, or a lady's hat, was without the slightest importance or significance, and had no reference or relation thereto whatsoever, and that an act cannot be a war act merely by calling the same so; but, upon the other hand, in order to justify such legislation the condition in respect to the subject-matter of legislation must exist and be urgent.

Complainants show unto the Court that such businesses as the complainant companies carry on are not in interstate commerce, but confined solely to local business within the the State of Mississippi; neither has it to do with any other matter or power falling within the range of congressional legislation or committed to Congress by the Constitution of the United States as a proper subject-matter of legislation.

(c) Complainants further show unto the Court that if they be mistaken in alleging that Congress was without power and authority to pass the Act of October 22, 1919, above referred to, then they allege and aver that the said Locke, State Fair Price Commissioner, and the said Taylor, are violating the said Act of Congress, both in letter and in spirit, in the maximum profit which they have fixed, determined and promulgated, and are attempting to intimidate the Complainants and other merchants in the State of Mississippi to submit to. Complainants sell no wearing apparel having reference to carrying on war.

Complainants show unto the Court that if Congress had the power to pass any such Act as was passed, that it was not the intention of Congress to deprive the Complainants of a fair and reasonable profit arising from the purchase and re-sale of their merchandise. Upon the other hand, it was the intention of the Congress of the United States in the passage of such Act that merchants should have, receive and enjoy a remunerative profit, at least as high a profit as was enjoyed prior to the war, because the Government itself levies by way of income and other purposes upon corporations, and upon the complainant corporations, as well as others, a very high tax, and it is necessary for it to do a more profitable business in order to yield the income which the Government would expect from the complainants.

Complainants show unto the Court that the maximum profit fixed and promulgated by the State Fair Price Commissioner, acting through the said Locke, and which are attempted to be enforced upon the complainants by the said Locke and the said Taylor are confiscatory, in that they are unreasonably low, and would not allow to the complainants a fair and reasonable margin of profit for the opertion of their said business, and the complainants could only operate their business of selling wearing apparel at a positive loss.

Complainants show unto the Court that said proclamation would require the complainants to sell men's and boys' suits costing twenty-five dollars upon a margin of only 33 1-3 per cent; and would require complainants to sell such suits costing not over fifty dollars at a profit of not exceeding 35 per cent; would require them to sell shoes costing ten dollars at a profit of not over 33 1-3 per cent; would compel the complainants to sell ladies'

and misses' hats costing as much as fifteen dollars for a profit of not over 40 per cent.

Complainants show that in the ordinary conduct of their business that they could not sell all of such articles of wearing apparel upon such basis of profit and realize any profit therefrom; that upon the other hand, the cost of doing business, that is to say the cost of ascertaining the requirements of their customers, anticipating the same, purchasing and re-selling goods therefor, is so great that if the complainants should sell goods at or upon the basis of profit therein proclaimed they would lose money instead of making money, and would operate their business at a loss.

Complainants show unto the Court that during the year 1919 the R. E. Kennington Company sold in round figures a million dollars worth of goods, and in its entire turn-over during the said year it did not average but 5.8 per cent profit, an itemized statement of which is hereto attached, marked Exhibit "A" to this bill of complaint, the same being asked to be considered the same as if set out herein in full in words and figures, although it sold said merchandise in some instances at a greater profit than is allowed, determined and fixed by the proclamation of the said Fair Price Commissioners, and if it should have to reduce its prices upon wearing apparel in accordance with such illegal, unlawful and arbitrary fixation of prices it would operate at a loss from such conformity thereto, and other complainants do business on the same basis.

Complainants further show unto the Court that the said Fair Price Committee purports to fix the profit to be had and received by the complainants on staple and fancy dry goods, although such staple and fancy dry goods are in no sense wearing apparel.

Complainants show unto the Court that the margin of profits as fixed by the said Fair Price Commissioners are arbitrary and have no reference to what basis of profit is necessary to the operation of such business which would really yield a remunerative profit, and they are arbitrary and confiscatory, and the complainants allege and aver that the profit is fixed upon lower basis than anywhere else in the United States; that said fixation ignores entirely the cost of replacement of the goods, is based entirely upon the actual cost of the goods without reference to the time when such goods were bought and what it would cost the complainants to replace the same

in the open market if they had to do so; and such fixation is further null and void and unlawful, wrong and arbitrary, and of no effect, because the said defendants, or any of them, in fixing the margin of profits to be charged by the complainants confessedly and admittedly have no power or authority to fix the price of any element of goods or expenses which enter into the complainants' business; they have no power or right, and will not attempt to exercise any power or right, to fix the rate of interest which the complainants are required to pay, the cost of clerk hire, the rent, insurance, or any of the other numerous expenses of complainants which grow out of the operation of their business and which should be added to the actual cost thereof, and should be taken into consideration in determining the profit necessary to be realized from a sale of such merchandise. Such fixation of prices further ignores and fails to take into consideration the loss to be sustained by the complainants growing out of the fact that many articles of wearing apparel out of each purchase, on account of change of styles, tastes and fashions, will become unsalable and a loss will be sustained, or will have to be carried beyond season and sold for anything the same can obtain, but it is based upon an economic policy of making each separate and independent sale stand on its own facts without reference to the entire conduct of the complainants' business or any line or department thereof.

(d) The complainants further show unto the Court that the activities of the said Fair Price Commissioners in attempting to proclaim and fix the margins of profit upon which the complainants shall operate their business is wrongful, arbitrary and illegal, because Congress has no power or authority under the laws and Constitution of the United States to delegate the power to fix margins of profit to any person, official, body or organization whatsoever. Further, that the President of the United States, in pursuance of such Act of October 22, 1919, has not issued any rules and regulations, nor has anyone else issued them for him as provided in said Act, and there has been no attempt under such Act by the President of the United States, or any one for him to fix the prices of wearing apparel, if any such right should exist, which is denied.

(12) Complainants show unto the Court that the large part of the business of said complainants is that of

buying and selling retail, as herein before set out, wearing apparel; that the purchase and sale of wearing apparel forms such a large portion of their business that if they should be compelled to adopt the maximum profits contained in the proclamation of the Fair Price Commissioner, which the City Fair Price Commissioner is endeavoring to coerce upon them, their business would be operated at an actual loss instead of a profit, in that the basis of profit allowed is not sufficient to allow the complainants to operate their business and receive sufficient revenue therefrom to successfully operate their said business.

(13) The Complainants further show unto the Court that the said State Fair Price Commissioner Locke, and the City Fair Price Commissioner Taylor, who are defendants herein, as herein before set out, have sought and contrived by various and sundry means to injure complainants and injure their business; that they autocratically and arbitrarily demanded of the complainants that which they have no right to exact, that they deliver and turn over to them invoices covering their wearing apparel, and when they, standing upon their constitutional rights, declined to do so, they hold them out to the public as profiteers; that the R. E. Kennington Company is one of the largest merchants in the State of Mississippi, and the said Locke and the said Taylor, for the purpose of intimidating and coercing the other and smaller merchants in the State of Mississippi to deliver and show to the State Fair Price Commissioner, or any of his subordinates, their books, records, and invoices, and in order to compel and arbitrarily coerce them to conform to the basis of profit which they have autocratically, arbitrarily and illegally assumed to fix, the defendants have by various and sundry ways, by unlawfully and untruthfully advertising them as profiteers, by making threatening statements as to what they propose to do with them, by threatening to prosecute them, have them arrested and sent to jail for violating the law, have sought by such means not only to coerce the complainants, but through them other merchants in the State of Mississippi who have dared to stand on their constitutional rights and refuse to deliver such invoices for inspection or refused to conform to the unlawful, arbitrary and confiscatory basis of profit assumed to be fixed by the said State Fair Price Commissioner and his subordinates and associates in the State of Mississippi.

(14) Complainants show unto the Court that they are informed and upon information allege and aver, that unless the complainants do deliver their invoices to the said State Fair Price Commissioner or the City Fair Price Commissioner Taylor, and unless they do conform their basis of profit to that fixed by the arbitrary and confiscatory decree of the State Fair Price Commissioner that they will go before the grand jury to be called together on next Monday, which is the third day of May, 1920, and each grand jury thereafter, and cause complainants to be indicted, arrested and tried because of their failure and refusal to conform to the basis of profit fixed in said proclamation, and to change their entire business and operate the same upon a scale of profit arbitrarily, autocratically and unlawfully fixed; that such action will be taken, so the complainants are advised, and belive, and allege and aver, for the sole and only purpose of coercing them, and through them other merchants in the State of Mississippi, who will be intimidated and influenced thereby to adopt the basis of profits unlawfully, arbitrarily and autocratically proclaimed by the said State Fair Price Commissioner, and which they are endeavoring by intimidation, coercion, propoganda and unlawful prosecution to force the complainants, and after them other merchants of the State to adopt.

(15) Complainants show unto the Court that the said Act of October 22, 1919, cannot become the basis of a criminal prosecution, and that no legal indictment can be based upon the provisions of said statute.

Complainants show unto the Court that the complainants do not hoard any merchandise; that every article of wearing apparel and other merchandise which they have in their stores is for sale every day in the week and every hour in the day at one uniform price fixed by the management of said businesses; that such price is fixed by the management of such businesses at such an amount as from past experience, judgment and observation the complainants believe will secure to them a fair and reasonable return on their business.

Complainants show unto the Court, however, that said Act of October 22, 1919, charges now no crime against the complainants, or either of them, for the following reasons, to-wit:

(a) Congress was attempting in the passage of said Act to exercise a power not delegated to it by the Constitution of the United States.

(b) Because no state of war existed, as a matter of fact, between the United States and Germany and her allies at the time of the passage of such act.

(c) That wearing apparel bore no relation to such state of war as may have existed, if any, upon the 22nd day of October, 1919, or at any time since, so as to confer upon Congress authority to regulate the prices thereof.

(d) The said amending Act of October 22, 1919, and particularly Section 2 thereof, does not define the offense thereby denounced as a crime for which severe punishment and penalty is thereby provided, but leaves the definition thereof to the judgment and conscience of judges and juries in trials after the fact: therefore, said statute is necessarily an ex post facto law, in conflict with Article 1, Section 9, Sub-division 3 of the Constitution of the United States.

(e) By reason of said facts last aforesaid, said amending act is likewise in conflict and prohibited by Article 6 of the amendment to the Constitution of the United States, in that no one accused of a violation of said Act, in so far as it relates to wearing apparel, or the rates charged or prices made or exacted in handling, dealing in, or with selling the same, is or can be thereby informed of the nature or cause of the accusation against him, and no one at the time of the Act which forms the basis of the charge can by any possibility determine whether he is or is not violating such statute.

(f) Said amending Act of October 22, 1919, especially Section 2 thereof, amending Section 4 of the original Act is prohibited by, and is in violation of Article 8 of the Amendments to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment in that the punishment provided in said Section is provided for each separate sale which might be made by the complainants, and is therefore in violation of such amendment to the Constitution.

(g) Said amending Act of October 22, 1919, and particularly Section 2 therof, is in conflict with Article

5 of the Amendments to the Constitution of the United States, in that thereby complainants and each of them, and others similarly situated, are deprived of their liberty and of their property without due or any other process of law, and private property taken without just or any compensation, and in that they are subject to fine and imprisonment for an offense, or offenses, which they were not and could not be previously informed, and the commission of which they could not avoid, because they had not been, and could not be, advised as to what act or acts could or did constitute such offense, and in that they and each of them are and necessarily will be deprived of their liberty and property without due or any process of law, in that they are thereby deprived of the liberty and private property right of making and carrying out such contracts as they may desire concerning the handling, buying and selling of wearing apparel.

(h) The business in which the complainants are engaged of buying and selling or handling and dealing in wearing apparel is a private business, not of such a public nature as to permit the regulation thereof by public authority of the practices, rates, charges and methods employed, or the profit to be derived therefrom, and for such reason the act of Congress herinbefore referred to deprives the complainants of their property without due process of law, or the equal protection before the law, to which they are entitled.

(i) Said Act of Congress of October 22, 1919, especially Section 2 thereof, is in violation of the Constitution of the United States, in that it deprives the complainants of their property without due process of law, and deprives them of the equal protection of the law, in that those engaged in certain occupations, pursuits and businesses are wholly exempt from the operation thereof; that said Section is lacking in uniformity, which is essential to any act constituting or defining a crime, and is therefore unjust, unreasonable, and arbitrary for the reasons hereinbefore set out.

Complainants show unto the Court that at the utmost complainants would only be guilty in some instances of failing and refusing to comply with the maximum margin of profits as proclaimed by the Fair Price Commissioners, State and City, as aforesaid. If it be conceded that they are acting under the regulations of the Executive depart-

ment or Department of Justice of the United States, or any other board or department having authority to deal therewith, the Act of Congress of October 22, 1919, does not purport to make failure to comply with such regulations a crime; nothing should be added to such Act by construction, and this Court cannot by judicial construction convert into a crime that which Congress has not so designated and defined.

(16) Complainants show unto the Court that unless the said A. Mitchell Palmer, Locke, Taylor, Figg, Alexander and Fulgham are enjoined by this Court, they will upon the convening of the grand jury before this Court on the 3rd day of May, 1920, and at each term thereafter, for the purpose of coercing, intimidating and compelling the complainants to do that which they are not lawfully required to do, to conform their basis of profit to the unlawful, illegal and confiscatory and autocratic fixation and proclamation of the said Fair Price Commissioners, will offer evidence before the grand jury to be empaneled by this Honorable Court, and will unlawfully, arbitrarily, autocratically and in violation of the rights of the complainants, and each of them, seek to have each of the complainants indicted therefor.

(17) Complainants show unto the Court that if the said defendants are permitted to take such course, that is to say, if they are permitted to offer evidence before the grand jury in respect to the margin of profit fixed by the said State Fair Price Commissioner, and upon the refusal of the complainants to conform thereto, and if they are permitted to secure indictments from the grand jury based thereupon, these complainants show unto the Court that the complainants will sustain irreparable harm, injury and damage; that the complainants' good standing as merchants will be seriously injured and impaired; that the credit of the complainants will be seriously injured, impaired and probably jeopardized; that such unlawful, arbitrary and autocratic acts on part of the defendants, and each of them, will injure the complainants, in that it will tend to cause persons to cease to deal with the complainants and will hold them up to scorn and ridicule, all of which steps the complainants are advised will be taken solely and only for the purpose of said pretended unconstitutional, ineffectual and void statute to coerce the complainants autocratically, illegally and arbitrarily to conform the operation of their business in the sale of

wearing apparel to the basis of profits unlawfully, autocratically and arbitrarily fixed and proclaimed by the usurpers heretofore referred to.

(18) Complainants allege that they are without relief except in a court of equity.

(19) Wherefore, the complainants pray:

(1) That the defendants be required to answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived;

(2) That there be issued herein a preliminary or interlocutory injunction, to remain in effect until the final hearing of this cause, prohibiting defendants, their agents, representatives, and each of them, from enforcing, or attempting to enforce, against the complainants, and each of them, or against any of their agents or officers, or agents, officers or representatives of either of them, the act of Congress approved August 10, 1917, as amended by said Act of Congress approved October 22, 1919, from prosecuting, or attempting to prosecute or instituting or attempting to institute, any prosecution against them, or either of them, under said Act, and from in any manner interfering with them, or either of them, or with the business of them, or either of them, in taking or attempting to take any steps whatsoever in respect to them, or either of them, or the business of them or either of them under or by virtue of any right or authority claimed to exist by reason of said Act as amended, or any part thereof, and that upon final hearing said injunction will be made perpetual.

(3) The Court will declare and decree such Act of August 10, 1917, as amended by said Act of October 22, 1910, and particularly Section 1 of said Act of October 22, 1919, and Section 1 of said Act of August 10, 1917, as amended by said Section 1 of said Act of October 22, 1919, and Section 4 of said Act of 1917 (as amended by Section 2 of said Act of October 22, 1919, wholly invalid and of no effect as against these complainants, and each of them, and all others similarly situated.

(4) For such other, further and different relief as to the Court may seem just and meet in the premises, and for costs in their behalf expended.

GREEN AND GREEN,
WATKINS & WATKINS,
Attorneys for Complainants.

STATE OF MISSISSIPPI,

Hinds, County.

Personally came before me, the undersigned authority in and for said State and County, the within named R. E. Kennington, President of the R. E. Kennington Company and the Union Department Store, who makes oath that to the best of his knowledge and belief the matters and things herein alleged are true.

R. E. KENNINGTON.

Sworn to and subscribed before me this the 3rd day of May, 1920.

JOHN THOMPSON,

Clerk U. S. District Court.

STATEMENT SHOWNG FOR WHAT THE SALES OF R. E. KENNINGTON COMPANY FOR THE PAST FISCAL YEAR WERE SPENT, AND WHAT PERCENTAGE EACH ITEM BORE TO THE TOTAL SALES:

Cost of Goods Sold (Invoice)	$640,434.17	65.8%
Salaries	120,229.83	12.38%
Postage	1,762.93	00.18%
Delivery Service	4,112.30	00.42%
Advertising	13,109.37	01.35%
Stationery, Wrapping Paper, Twine, etc.	4,855.55	00.5%
Fire Insurance Premiums	1,704.87	00.17%
Electricity for Lighting and Power, including Light Globes and repairs to equipment	5,067.14	00.52%
Water	165.31	00.018%
Fuel	896.92	00.092%
Rent	19,452.60	01.9%
Repairs	3,603.66	00.4%
Telephone and Telegraph	852.12	00.09%
New York Buyers Expense	11,456.77	01.21%
Decorations	1,597.73	00.16%
Taxes (City, County and State)	5,875.28	00.6%
Interest	797.93	00.08%
Loss on Accounts and Depreciations on Fixtures and Equipment	5,470.03	.6%
Freight and Express	10,064.56	1.1%
Federal Income and Excess Profit Tax	54.072.28	5.6%
Miscellaneous Expense Items too small to classify	9,910.89	1.02%
Net Profit for year	57,361.48	5.8%
Total sales for year	$972,852.82	100.0%

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

R. E. Kennington et al.

v.

A. Mitchell Palmer et al.

Final Decree denying injunction and dismissing bill.

Be it remembered that this day came on to be heard the above entitled cause upon the application of the Complainants, R. E. Kennington, the R. E. Kennington Company, and the Union Department Store, for the issuance of a restraining order and a preliminary injunction whereof notice was duly given to the Honorable Julian Alexander, United States Attorney for the Southern District of Mississippi, and thereupon counsel for the said Complainant presented their said Bill and the application for said restraining order and preliminary injunction, which was then and there resisted by the said United States Attorney for and on behalf of himself and the Assistant District Attorney, defendants. (The other defendants not appearing or being served with notice), and the Court having heard the arguments of the respective parties was of opinion that said Complainant had a plain, adequate and complete remedy at law, and that for this reason alone said Complainants were not entitled further to proceed in this cause in this Court, and that the Bill of Complainant should be dismissed; but, nevertheless, without prejudice, wherefore, it is hereby ordered, adjudged and decreed that the Bill herein be and the same is hereby dismissed finally, and that the defendants go hence without day, and that Complainants do pay all costs in this behalf to be taxed for all of which let execution issue. To all of which Complainants duly in open Court excepted and had their exception allowed and were given leave as part of this final decree forthwith to present to the Court a Petition for an appeal direct to the Supreme Court of the United States.

It is further ordered that this decree of dismissal is without prejudice to the rights, if any, Complainants may have at law.

Ordered, adjudged and decreed this the 6th day of May, 1920.

EDWIN R. HOLMES, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

R. E. Kennington et al

v.

A. Mitchell Palmer et al.

PETITION FOR APPEAL

The above named complainants, R. E. Kennington, The R. E. Kennington Company, and the Union Department Store, all and each of them, feeling themselves jointly and severally agreed by the decree entered in the above entitled cause on this 6th day of May, 1920, whereby it was ordered, adjudged and decreed that their bill of complaint be dismissed without prejudice, and petitioners jointly and severally respectfully represent that the said decree is a final decree and involves the construction and application of the constitution of the United States in and to the facts as averred in said bill setting forth thereunder that complainants and each of them were denied their constitutional rights as will more fully appear by reference thereto, wherefor, reference is hereby made to save prolixity; but complainants and each of them further say that said cause involves the construction and application between complainants and defendants of:

(A) Article 1, Section 1, wherein Legislative power was vested in Congress of the United States;

(B) Article 1, Section 8, whereunder Congress is given power, subdivision 5, to coin money, regulate the value thereof and of foreign coin;

(C) Article 1, Section 8 thereof, whereunder Subdivision 11 Congress was given power to declare war.

(D) Article 1, Section 8 thereof, subdivision 18, whereunder power is given to carry into effect the foregoing powers and all other powers vested in said government of the United States.

(E) Article 3, Section 2 thereof, whereby the judicial power is vested Subdivision 1 in the courts of the United States.

(F) Article 4, Subdivision 4 thereof, requiring a guaranty to every state in the Union of a Republican form of Government.

(G) Article 6, Section 2 thereof, whereunder said Constitution and the laws made in pursuance thereof are the supreme laws of the land.

(H) The fourth amendment thereof, whereunder rights of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures is granted.

(I) Amendment fifth thereof whereunder no person can be deprived of life, liberty or property without due process of law or have his property taken for public use without just compensation.

(J) Amendment 6th thereof, where in all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial by an impartial jury and to be informed of the nature and cause of the accusation against him and to be confronted by the witnesses.

(K) Amendment 9 thereof, whereunder the enumeration of the rights contained in said constitution are not to disparage or deny further rights.

And complainants further aver that in said cause is drawn in question the constitutionality of a certain alleged law of the United States, commonly known as the Lever law, enacted October 22nd, 1919, and the original act whereof this is an amendment passed August 10th, 1917, and complainants and each of them further show that the divers and sundry powers and prerogatives were assumed by said respondents as set forth in said bill, all in contravention of said constitutional rights of said complainants and of their statutory rights in the premises; and that in the rendition of said decree, the rights to so file this petition as a part thereof was expressly reserved and now complaints in virtue thereof pray an appeal direct to the supreme court of the United States and assign for errors, all those certain errors set forth in the assignment of errors herewith filed and prays that this appeal may be allowed the amount of the bond therefor fixed and that a transcript of the record, papers and proceedings, duly authenticated may be forthwith sent direct to the supreme court of the United States.

R. E. KENNINGTON,
THE R. E. KENNINGTON COMPANY,
UNION DEPARTMENT STORE.
By WATKINS & WATKINS,
GREEN AND GREEN,
Their Solicitors.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF THE STATE OF MISSISSIPPI.

R. E. Kennington et al

v.

A. Mitchell Palmer et al.

ASSIGNMENT ERRORS

Now comes the complainants and each of them in the above entitled cause and file herein the following assignment of errors as to them and each of them and for such errors assign the following:

(1) The District Court erred in dismissing said bill.

(2) The Court erred in not granting to the complainants and to each of them the relief and all of it as prayed in the said bill herein by them filed.

(3) The Court erred in not declaring said Lever Law, in so far as it seeks to affect the said complainants and each of them under the allegations of the said bill, in violation of those sections of the Constitution of the United States set forth in said bill, that is to say as being under the allegations of said bill in contravention of—

Article I, Section 1, wherein all legislative power was vested in the Congress of the United States.

Article I, section 8, whereunder Congress is given power under Subdivision 5 thereof, to coin money, regulate the value thereof and of foreign coin.

Article I, Section 8, whereunder Congress is given the sole power to declare war.

Article I, Section 8, whereunder Congress is given power under Subdivision 18th thereof to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States.

Article 3, Section 2 thereof, whereby the judicial power under Subdivision 1 thereof is vested in the Courts of the United States.

Article 4, Section 4 thereof, whereunder the United States is required to guarantee to each State in the Union a republican form of government.

Article 6, Section 2 thereof, whereunder it is declared

that this constitution and all laws made in pursuance thereof shall be the supreme law of the land.

The Fourth Amendment thereof, whereunder the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures is guaranteed.

The Fifth Amendment thereof, whereunder no person can be deprived of property, life or liberty without due process of law.

The Fifth Amendment thereof, whereunder no person shall have his private property taken for public use without just compensation.

The Sixth Amendment thereof, whereunder, in all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury of the State and District and to be informed of the nature and cause of the accusation against him and to be confronted by the witnesses.

Amendment Ninth thereof, whereunder it is declared that the enumeration in said Constitution shall not be construed to deny or disparage other rights retained by the people and the several States and not delegated to the United States.

(4) The Court erred in not holding that said Fair Price Commission of the State of Mississippi was without power and authority to publish said alleged fair price list and thereunder fix the price of the commodities therein set forth.

(5) The Court erred in not holding said provisions of the said Lever Law so uncertain and vague as to be unenforceable.

(6) The Court erred in not holding that the said Fair Price Commission of the State of Mississippi was wholly without power and/or authority as to

(a) Fixation of prices of luxuries.

(b) Disregarding the replacement value and predicating the selling price absolutely upon the original cost thereof plus said margin.

(c) In holding the said Commission vested with rights as to style.

(d) As to making charges for the furnishing of style.

(e) In disregarding additional buying expenses.

(f) In not integrating expenses incident to changing of style and other variable factors set forth in said bill.

(g) In the other respects set forth in said bill.

Wherefore the complainants and each of them pray that said decree of the District Court may be reversed as to them and each of them and this cause be remanded to be proceeded with in conformity to law.

WATKINS & WATKINS,
Solicitors.

GREEN AND GREEN,
Solicitors for Complainants.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

R. E. Kennington et al.

v.

A. Mitchell Palmer et al.

ORDER ALLOWING APPEAL

Now on this 6th day of May, 1920, the said complainants and each of them having duly filed therein the assignment of errors and petition for appeal from that certain decree entered in said cause on the 6th day of May, 1920, finally dismissing said bill, it is hereby ordered by the court that an appeal to the supreme court of the United States from the final decree heretofore filed and entered herein be and the same is hereby allowed and that a certified transcript of the record be forthwith transmitted in accordance with law to said court and it is further ordered that complainants have the right so thus to appeal upon the execution by them of a bond in the sum of One Thousand Dollars to be by them filed and to be by the Clerk approved.

Ordered this May 6th, 1920.

EDWIN R. HOLMES,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI AT JACKSON.

R. E. Kennington,
The R. E. Kennington Co.,
And Union Department Store

v. In Equity—No. 118.

A. Mitchell Palmer et al.

APPEAL BOND

We, R. E. Kennington, the R. E. Kennington Company and the Union Department Store, Principals, and W. H. Watkins and H. V. Watkins, Sureties, hold ourselves well and truly bound unto the United States in the sum of One Thousand Dollars ($1,000.00), for the payment of which amount, we bind ourselves, our heirs and assigns.

The condition of the foregoing obligation is that, whereas, upon the 6th day of May, 1920, the Hon. Edwin R. Holmes, Judge of the District Court of the United States for the Southern District of Mississippi, at Jackson, rendered a decree dismissing the original bill of complaint in the above entitled cause, and:

Whereas, the above bound principals, who are the complainants in said cause, being aggreived at said decree, have demanded an appeal to the Supreme Court of the United States, now:

Therefore, if the above bound R. E. Kennington, R. E. Kennington Company and the Union Department Store shall well and truly prosecute such appeal, and fully pay and satisfy such judgment as may be rendered by the Supreme Court of the United States against them, or either of them, in said cause, as well as the costs of the court to be taxed, this obligation shall be and become void; otherwise, shall remain in full force and effect.

Signed this, the 6th day of May, 1920.

R. E. KENNINGTON,
By W. H. WATKINS,
Attorney.

R. E. KENNINGTON CO.
By W. H. WATKINS.
Attorney.

UNION DEPARTMENT STORE,
By W. H. WATKINS,
Attorney.

W. H. WATKINS,
H. V. WATKINS,
Sureties.

The foregoing bond is approved, this 6th day of May, 1920.

JACK THOMPSON,
Clerk District Court of the United States for the Southern District of Mississippi, at Jackson.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

R. E. Kennington et al

v.

A. Mitchell Palmer et al.

ENTRY OF APPEARANCE IN THE SUPREME COURT

Comes Julian P. Alexander, United States District Attorney for the Southern Distirct of Mississippi, Jackson Division, and H. M. Fulgham, Assistant United States Distirct Attorney for the Southern District of Mississippi, Jackson Division, and waive citation and service thereon upon appeal to the Supreme Court of the United States herein prayed by Complainants in said cause under the order of the District Judge allowing said appeal on May 6, 1920, and hereby enter their appearance as Appellees in said Supreme Court in said appeal.

JULIAN P. ALEXANDER,
United States District Attorney Southern District of Mississippi, Jackson Division.

H. McK. FULGHAM,
Assistant United States District Attorney Southern District of Mississippi, Jackson, Division.

May 22, 1920.

Hon. Solicitor General King,

Dept. of Justice, Washington, D. C.

Relative Kennington vs. Alexander involving phases Lever Law discussed with you. Record being printed here may we please therein recite that you waive citation for appellees and enter appearance. Answer quick.

GREEN & GREEN.

Wahington, D. C., May 22, 1920.

Green and Green,

Jackson, Miss.

You may receite waiver citation. I will enter appearance as soon as record filed.

KING, Solicitor General.

IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF MISSISSPPI,
JACKSON DIVISION.

R. E. Kennington et al

v.

A. Mitchell Palmer et al.

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Supreme Court under the appeal heretofore perfected in said Court, and include in said transcript the following pleadings and papers on file, to-wit:

1. Caption of record.
2. Original Bill of Complaint.
3. Final decree denying injunction and dismissing Bill.
4. Petition for appeal.
5. Assignment of Errors.
6. Order allowing appeal.
7. Appeal bond.
8. Citation and acknowledgement of service theron.
9. Clerk's certificate to transcript.

WATKINS & WATKINS,
GREEN & GREEN,
Solicitors for Appellants.

This Praececipe contains a complete record of all proceedings.

JULIAN P. ALEXANDER.
M. McK. FULGHAM.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

I, Jack Thompson, Clerk of the District Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing pages contains a true and correct transcript of the record in the case of R. E. Kennington et al. vs. A. Mitchell Palmer et al., as the same appears of record in my office at Jackson, Mississippi.

Witness my hand and seal of said court at Jackson, in said District this May 21, 1920.

JACK THOMPSON, Clerk.

FILE COPY

No. 367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

R. R. KENNINGTON, ET AL

v.

A. MITCHELL PALMER, ET AL

MOTION TO ADVANCE

MARCELLUS GREEN,
GARNER W. GREEN,
WM. H. WATKINS,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

R. E. KENNINGTON, ET AL

v.

A. MITCHELL PALMER, ET AL.

MOTION TO ADVANCE

MARCELLUS GREEN,
GARNER W. GREEN,
WM. H. WATKINS,
Attorneys for Plaintiffs in Error.

Come appellants, by solicitors and move the Court to advance this cause for hearing at the earlist time compatible with the other business of the Court, and for grounds thereof assigns:

(1) This appeal is from a final decree of the District Court of the United States, for the Jackson Division of the Southern District of Mississippi, under Section 268 of the Judicial Code, direct to this Court, involving the constitutionality of that certain act, passed and approved upon the 10th day of August, 1917, and the Amendment thereof passed and approved upon the 22nd day of October, 1919, commonly called the Lever Bill, whereunder Congress sought to assume power to fix the price of divers commodities, among others, wearing apparel, and the Act is alleged to be in contravantion of

divers provisions of the Federal Constitution, more fully set forth in said Bill. That the Act is sought to be enforced to the great detriment of complainants and under its terms there is sought to be imposed upon them certain onerous and unlawful burdens with reference to their private property, contrary to the provisions of the Constitution as in said bill more at large set forth, wherefor to save prolixity, reference is hereby made.

(2) That the said Act and its said Amendments are assumed to have a direct bearing upon the present high cost of living and in virtue of their alleged terms, it is sought by the defendants herein to exappropriate the property of complainants by prescribing the terms upon which said property, so owned may be sold, in virtue of the constitutional rights of the Complainants, as will more at length appear by reference to the said bill, wherefor to save prolixity reference is hereby made.

(3) That divers other questions of great importance are involved in said suit, involving the public welfare and the rights of Federal Officials, the determination whereof is requisite and proper at the earliest possible time; there being now, by reason of no controlling decision by this Court great contrariety of judicial decision among the District Courts as to the validity of said act under the Constitution, and if valid, what are the correct delineation of the powers and authorities thereunder conferred, there being as to these likewise great contrariety, it being held by some Courts of Districts that said act is so vague as not to be enforceable.

(3) That proceeding under said act, if constitutional, and capable of enforcement, the Federal Officials, as shown by the said bill, wherefor reference to the bill is made to save prolixity, have fixed divers lists whereat commodities, especially wearing apparel, shall be sold, and the limits and prices are so diverse and conflicting that there is no uniformity of interpretation and there is

great confusion which undermines the respect wherefor the law should be held.

(4) That all of these questions, are set forth in said bill, showing that said act, and its said amendment, are:

(a) Unconstitutional, or if not;

(b) Unenforceable, because vague and uncertain, or if not;

(c) Wrongfully, divers Federal Officials have assumed jurisdiction over matters whereover they have no power and with reference to which their acts are wrongful and are constituting irreparable damage to these complainants and appellants.

(5) That large penalties are imposed for violation of said Acts, if the same are valid and capable of being enforced, which ought not to be imposed before these questions are settled.

(6) That due notice of the filing of this motion was given the Hon. Solicitor General of the United States and there is no objection upon the part of the Government to having this case advanced so that all of the phases of this question may be presented at a hearing whereat all matters can be brought out at one time—the Government having moved to advance certain case wherein the said Act was held unconstitutional.

(7) That the District Attorney of the State of Mississippi and the Fair Price Commissioner of the said State, as well as the other defendants interpret said statute and the divers regulations as being valid and prosecutions will be had for each disobedience until an authoritative decision by this Court as to said several points is made.

(8) That said question is of great public interest and importance and upon its correct decision vast activities of the Government of the United States depend.

(9) That its present enforcement, if unlawful, is involving large expense to the United States which should not be paid out if the contentions of the complainants are correct.

Wherefore, complainants and each of them move the Court that this cause be advanced upon the docket and

assigned for hearing at the time of the hearing of the other cases involving similar questions, wherefore etc.

Marcellus Green,
Lorner H. Green,
Hugh A. Watters.

Attorneys for Plaintiffs in Error

We hereby certify that a copy of the foregoing motion was sent by registered mail to the Hon. Solicitor General of the United States, Washington, D. C., in pursuance of prior direction upon his part so to send the same.

Sworn to and subscribed before me this 27 day of May, 1920.

R. Moore Jr
Notary Public

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In the Supreme Court of the United States

OCTOBER TERM, 1920

R. E. KENNINGTON, ET AL.,
Plaintiffs in Error

V.

A. MITCHELL PALMER, ET AL.,
Defendant in Error

BRIEF FOR PLAINTIFFS IN ERROR.

WM. H. WATKINS,
Attorney for Plaintiffs in Error.

THE TUSCARORA PRESS, AKRON, OHIO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

R. E. KENNINGTON, Et Al., Plaintiffs in Error

vs.

A. MITCHELL PALMER, et al., Defendants in Error

BRIEF FOR THE PLAINTIFFS IN ERROR

Upon the 3rd day of May, 1920, the plaintiffs in error exhibited their original bill of complaint in the District Court of the United States for the Southern District of Mississippi, at Jackson, Mississippi, against A. Mitchell Palmer, Attorney General of the United States; H. E. Figg, Fair Price Commissioner of the United States; T. J. Locke, Fair Price Commissioner of the State of Mississippi; S. J. Taylor, Fair Price Commissioner for the City of Jackson, Mississippi; Julian Alexander, United States District Attorney for the Southern District of Mississippi, and his Assistant, H. M. Fulgham.

The original bill of complaint alleged, among other things, the following facts:

(1) That the complainants, R. E. Kennington, R. E. Kennington Company, and the Union Department Store, the last two mentioned complainants being corporations domiciled at Jackson, Mississippi, owned and operated department stores in the State of Mississippi, known as the R. E. Kennington Company and the Union Department Store, situated in Jackson, Mississippi, and R. E. Kennington individually, operating a department store in Yazoo City, Yazoo County, Mississippi, the said R. E. Kennington owning the majority of the stock and being the executive head of the two last mentioned corporations; that these corporations were engaged in selling merchandise throughout the State of Mississippi, at retail and at wholesale; that such businesses had been conducted for a long period of time, and had been continuously operated upon a fairly remunerative basis.

(2) That in order to conduct the business of complainants it was necessary to maintain a large force of employees, to own and equip store buildings, to maintain offices in the City of New York, and in the City of Paris, France, to incur large obligations for borrowed money, and for merchandise purchased on credit in the usual course of business; and that it was necessary for the complainants to have and maintain a first-class credit rating.

(3) That the complainants bought and sold, among other articles, what is known as "wearing apparel;" and that in handling wearing apparel they studied, and anticipated and endeavored to satisfy the tastes, whim, caprices of their customers, all of which required large investment, time and money; and that by strict attention and efficient management of the business they have built up a reputation as vendors of high grade merchandise, as well as a reuptation for fair and honest dealing, and had acquired the good-will of the public, which was a part of their property.

(4) That growing out of the world war, there had been a great increase in the prices of necessaries of life and of all kinds of commercial commodities, and especially wearing apparel. The bill of complaint alleged that such state of facts had arisen from:

(a) An inflated currency.

(b) The diversion of the producing man power of the country into war time activities;

(c) The lack of importation of foreign labor into the country, and the reduction in production occasioned thereby;

(d) The enormous demands for all kinds of food stuffs, wearing apparel, etc., growing out of the world war, as well as the reckless expenditure of money incident thereto.

(5) That for the avowed purpose of reducing prices, especially upon necessities of life, including wearing apparel, upon the 22nd day of October, 1919, the Congress of the United States amended Section 1 of the Lever Act of August 10, 1917, making the same to read as follows:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation and private controls affecting such supply, distribution and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes, the instrumentalities, means, methods, powers, authorities, duties, obligations and prohibitions hereinafter set forth, are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

And that Section 4 of the Act of August 10, 1917, was amended to read as follows:

"That it is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to permit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their productions, manufacture or distribution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate of charge in handling

or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit or lessen the manufacture or production of necessaries in order to enhance the price therefor; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this Section. Any person violating any of the provisions of this section, upon conviction thereof, shall be fined not exceeding $5,000.00, or be imprisoned for more than two years, or both: Provided that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturists with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, that nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products produced or raised by its members upon lands owned, leased or cultivated by them."

(6) That no regulations have been made and no orders issued either by or for the President, or otherwise, in respect to the sale of weraing apparel; that no prices, rates, or charges whatsoever have been fixed either by the President, or on his behalf, by any official person or agency whatsoever;

(7) That the defendant, H. E. Figg, assuming to act as United States Fair Price Commissioner, had appointed the defendant, T. J. Locke, as State Fair Price Commissioner for the State of Mississippi; and that he, in turn, had appointed the defendant S. J. Taylor as Fair Price Commissioner for the City of Jackson, in the First Judicial District of Hinds County, Mississippi;

(8) That the said Fair Price Commissioner for the State of Mississippi had proclaimed and issued the following proclamation in respect to the sale of wearing apparel in the State of Mississippi:

"Fair Price Committees are advised that the Commissioner for Mississippi has this thirtieth day of April fixed and does hereby promulgate the following maximum prices and maximum margins of profit which a retail merchant handling the following named articles of merchandise may charge, and these prices and margins of profit are based on actual, original cost, plus freight or express and war tax, and they are maximum; merchants may sell for less.

Men's and boys suits, costing up to $25, margin of profit 33 1-3 per cent; costing from $25 to $50, inclusive, margin of profit 35 per cent. The commissioner fixes no margains on suits costing merchants above $50.

Ladies' and misses' suits and dresses, same margin of profit as on men's and boys' suits.

Men's, ladies' and children's shoes, costing up to $3, margain of profit 25 per cent; costing from $3 to8, margin of profit 30 per cent; costing from $8 to $10, inclusive, 33 1-3 per cent. The commissioner fixes no margin on shoes costing merchant above $10.

Men's and children's hats: Costing up to $5, margin of profit 30 per cent; costing from $5 to $10, inclusive, 40 per cent; all straw hats, margin of profit 40 per cent. No margin fixed on hats costing merchant above $10.

Ladies' and misses' hats: Costing up to $5, margin of profit 30 per cent; costing from $5 to $10, margin of profit 40 per cent. No margins fixed on ladies' hats costing merchant above $15.

Dry Goods: The margin of profit on all staple dry goods is 33 1-3 per cent; the margin of profit on all fancy dry goods is 40 per cent."

(9) That the said State Fair Price Commissioner and the Fair Price Commissioner for the City of Jackson

had caused the complainants to be inforomed that unless they complied with the basis of profit included in the proclamation hereinbefore set out, that they, and each of them, as well as their agents, servants and employees, would be arrested and prosecuted, and that they, and each of them, must conform their basis of profits as fixed in the said proclamation;

(10) That the said Fair Price Commissioners were subjecting the complainants' places of business to a system of espionage for the purpose of ascertaining whether or not the complainants were receiving any higher basis of profit upon any article of merchandise sold by them, or either of them, than allowed in the said proclamation;

(11) That complainants are not manufacturers of wearing apparel, but that they purchase wearing apparel for re-sale to their trade; that in fixing the prices of their merchandise it was independently of all other dealers; that there is no combination of any kind in restraint of trade between complainants and their competitors; but that the fullest and freest competition exists;

(12) That the complainants are not hoarders of merchandise, but that every article of goods which they possess are daily offered for sale at the customary price; that they do not engage in any interstate business, but that all of their business is local, confined to the City of Jackson and contiguous territory, and that the business engaged in is of a purely private nature, and in no manner coupled with the business of public interest.

(13) That the act of Congress in question is void and uniforcible, because having no relation to any war time necessities on the part of the United States Government, in respect to which the original bill of complaint contains the following allegation:

> "Complainants show unto the Court that said Act of October 22, 1919, being an Act amendatory to the original Lever Act, purported to be enacted as a war time measure. Complainants show unto the Court, however, that the war between the United States and its allies and Germany terminated in November, 1918,

that th the military and naval forces of the United States and its its allies began to demobilize soon thereafter, and upon On October 22, 1919, the military forces of the United States es were practically demobilized, and the United States es Government upon October 22, 1919, had ceased all war ar activities, and it had discahrged the Committee chargeged with the duty of fixing the price of coal, had turned ed back to the owners thereof the telegraph and telepho hone companies, and was ready to turn back to the owowners thereof the railroads, which it has done since, a, as a matter of fact; if war existed at all between the UnJnited States and Germany on October 22, 1919, it existsted only in theory and not in fact.

AnAnd complainants further show unto the Court that ththe passage of said Act of October 22, 1919, had no refeference or relation, either near or remote, direct or indirlirect, to any state of war which may have existed, e either in fact or theoretically, at the time of its passagege, and Congress was without power and authority y under the laws and Constitution of the United States s after the termination of such war to pass any such acact, and certainly without power and authority to passs an act dealing with wearing apparel, which, upon OOctober 22, 1919, could have absolutely no relation or r bearing upon such state of war as may have existed.d. In other words, these complainants allege and avever that upon October 22, 1919, and at all times since ssaid date, so far as the carrying on of war between t the United States and Germany is concerned, if any s such war existed, either theoretically or as a matter c of fact, the price which the complainants might charge e for a gingham dress, or a pair of high heel shoes, a a gentleman's collar, a crepe de chine lady's dress, oor a lady's hat, was without the slightest importancce or signifcance, and had no reference or relation theereto whatsoever, and that an act cannot be a war actt merely by calling the same so; but, upon the other haand, in order to justify such legislation the con-

dition in respect to the subject-matter of legislation must exist and be urgent."

(14) That the prices fixed by the said Fair Price Commissioners are unreasonably low—so low as to be confiscatory; that neither the said Locke or the said Taylor have had experience in the operation of department stores, and are utterly without knowledge or information in respect to the operation thereof, or the basis of profit that should be allowed, and in respect to the basis of profit being confiscatory used the following language:

"Complainants show unto the Court that said proclamation would require the complainants to sell men's and boys' suits costing twenty-five dollars upon a margin of only 33 1-2 per cent; and would require complainants to sell suits costing not over fifty dollars at a profit of not exceeding 35 per cent; would require them to sell shoes costing ten dollars at a profit of not over 33 1-3 per cent; would compel the complainants to sell ladies' and misses' hats costing as much as fifteen dollars for a profit of not over 40 per cent.

Complainants show that in the ordinary conduct of their business that they could not sell all of such articles of wearing apparel upon such basis of profit and realize any profit therefrom; that upon the other hand, the cost of doing business, that is to say the cost of ascertaining the requirements of their customers, anticipating the same, purchasing and re-selling goods therefor, is so great that if the complainants should sell goods at or upon the basis of profit therein proclaimed they would lose money instead of making money, and would operate their business at a loss.

Complainants show unto the Court that during the year 1919 R. E. Kennington Company sold in round figures a million dollars worth of goods, and in its entire turn-over during the said year it did not average but 5.8 per cent profit, and itemized statement of which is hereto attached, marked Exhibit "A" to this bill of complaint, the same being asked to be considered

as if set out herein in full in words and figures, although it sold said merchandise in some instances at a greater profit than is allowed, determined and fixed by the proclamation of the said Fair Price Commissioners, and if it should have to reduce its prices upon wearing apparel in accordance with such illegal, unlawful and arbitrary fixation of prices it would operate at a loss from such conformity thereto, and other complainants do business on the same basis."

(15) The bill of complaint contained the following allegation in respect to the unconstitutionality of the amendments to the Lever Act hereinbfore set out:

"Complainants show unto the Court, however, that said Act of October 22, 1919, charges now no crime against the complainants, or either of them, for the following reasons, to-wit:

(a) Congress was attempting in the passage of said Act to exercise a power not delegated to it by the Constitution of the United States.

(b) Because no state of war existed, as a matter of fact, between the United States and Germany and her allies at the time of the passage of such act.

(c) That wearing apparel bore no relation to such state of war as may have existed, if any, upon the 22nd day of October, 1919, or at any time since, so as to confer upon Congress authority to regulate the prices thereof.

(d) The said amending Act of October 22, 1919, and particularly Section 2 thereof, does not define the offense thereby denounced as a crime for which severe punishment and penalty is thereby provided, but leaves the definition thereof to the judgment and conscience of judges and juries in trials after the fact; therefore, said statute is necessarily an ex post facto law, in conflict with Article 1, Section 9, Sub-division 3 of the Constitution of the United States.

(e) By reason of said facts last aforesaid, said amending act is likewise in conflict with and prohibited by Article 6 of the amendment to the Constitution of

United State, in that no one accused of a violation of said act, in so far as it relates to wearing apparel, or the rates chaged or prices made or exacted in handling, dealing in, orwith selling the same, is or can be thereby informed of the nature or cause of the accusation against him,and no one at the time of the Act which forms the basis of the charge can by any possibility determine whether he is or not violating such statute.

(f) Sail amending Act of October 22, 1919, especially Section 2 thereof, amending Section 4 of the original Act is prohibited by law, and is in violation of Artice 8 of the Amendments to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment in that the punishment provided in said Section is provided for each separate sale which might be made by the complainants, and is therefore in violation of such amendment to the Constitution.

(g) Said amending Act of October 22, 1919, and particularly Section 2 thereof, is in conflict with Article 5 of the Amendments to the Constitution of the United States, in that thereby complainants and each of them, and others similarly situated, are deprived of their liberty and of their property without due or any other process of law, and private property taken without just or any compensation, and in that they are subject to fine and imprisonment for an offense, or offenses, which they were not and could not be previously informed, and the commission of which they could not avoid, because they had not been, and could not be, advised as to what act or acts could or did constitute such offense, and in that they and each of them are and necessarily will be deprived of their liberty and property without due or any other process of law, in that they are thereby deprived of the liberty and private property right of making and carrying out such contracts as they may desire concerning the handling, buyimg and selling of wearing apparel."

(16) The bill of complaint alleged that the defendants thereto announced their purpose of causing the complainants, and each of them, to be arrested, indicted and tried on account of their failure and refusal to conform their basis of profit and the method of operating their business to the proclamation of said Fair Price Commissioners of the State of Mississippi and of the City of Jackson, and that they would be arrested, indicted and tried by reason thereof, unless enjoined by the Court.

The bill further alleged that such criminal prosecutions would subject the complainants, and each of them, to irreparable damage, in that they would be burdened with innumerable prosecutions, which prosecutions would be unjust and wrongful, because based upon unconstitutional enactments of Congress, and because of the abuse to which such enactments were sought to be used by the defendants, and the complainants would further sustain irreparable damage and loss because of the damage to them, and each of them, in their business, loss of credit, injury to financial standing, and good-will growing out of such criminal prosecutions, if they were permitted to take place.

(17) The bill of complaint further alleged that the defendants had selected the complainants as the largest merchants in the State of Mississippi, and were intending to coerce them to conform to the basis of profits fixed by the Fair Price Commissioners, and through them were intending to coerce the merchants of the State of Mississippi; that they were confessedly endeavoring, as they expressed it, to make examples of the complainants because they failed and refused to submit to the wrongful, unlawful and imperious demands made upon them by the defendants, and that unless restrained by the Court the complainants would be caused to suffer irreparable injury therefrom.

The complainants upon filing the original bill of complaint in open court made application for a temporary restraining order, to which the United States District Attorney and his assistants then and there objected; a full and complete hearing was had upon the application, and the Court, being of the opinion that the complainants had

a plain, adequate and complete remedy at law, dismissed the original bill of complaint. (Transcript p. 31). A petition for appeal to this Court was filed and the same allowed by the Judge. (Transcript pp. 32, 33-36). The appeal was allowed under Section 238 of the Judicial Code of the United States.

ARGUMENT:

I.

THE LEVER ACT OF AUGUST 10, 1917, AS WELL AS AMENDMENTS OF OCTOBER 22, 1919, VIOLATED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT PRIVATE PROPERTY IS TAKEN WITHOUT DUE COMPENSATION.

Irrespective of the question as to whether or not a state of war existed on October 22, 1919, the Act complained of, as well as the amendments thereto, are unconstiuttional and a violation of the Fifth Amendment to the Constitution of the United States, because private property was thereby taken without due compensation.

It will, of course, be conceded that the right of the plaintiffs in error to buy goods and sell them in due course of business at such price as could be obtained, in the absence of any combination or agreement in restraint of trade, is property, protected against state legislation by the Fourteenth Amendment to the Constitution of the United States, and against illegal congressional legislation by the Fifth Amendment to the Constitution of the United States. Lochner v. State of New York, 198 U. S. 45, 49 L. Ed 937.

It is well established that, even in time of war, the Government cannot take private property without first making compensation therefor. Mitchell v. Harmony, 13 Hunt, 115; United States v. Russell, 13 Wall, 623, 627, 629; Milligan Case, 4 Wall, 121.

II.

UPON OCTOBER 22, 1919, AT THE DATE OF THE PASSAGE OF THE AMENDMENTS TO THE LEVER ACT CMPLAINED OF, AND AT THE TIME OF THE

FILING OF THE ORIGINAL BILL IN THIS CASE, EVEN IF WAR BETWEEN THE UNITED STATES AND GERMANY TECHNICALLY EXISTED, THE PURCHASE AND SALE OF WEARING APPAREL BORE NO SUCH RELATION THERETO AS JUSTIFIED GOVERNMENTAL INTERFERENCE WITH THE PRICE THEREOF.

Ordinarily, the Government cannot concern itself with the price obtained for merchandise. So long as a merchant conducts his business independently and not in unlawful combination with other persons he is entitled to obtain any price which he may in the open market for his merchandise, and may refuse to sell for any less price without subjecting himself to punishment therefor.

In Tiedeman's State and Federal Control of Persons and Property, Volume 1, Paragraph 96, the following language is used:

> "It is part of the natural and civil liberty to form business relations, free from the dictation of the state, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction. It is, therefore, the general rule, that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay; and no one can compel him to take less, although the price may be so exorbitant as to become extortionate. No one has a natural right to the enjoyment of another's property upon the payment of a reasonable compensation; for we have already recognized the right of one man to refuse to have dealings with another on any terms, whatever may be the motive for his refusal."

In the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, Mr. Justice Field, speaking for the Court, used the following language:

> "The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books

> and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the Legislature to interefere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States."

Therefore, it will doubtless be conceded that if legislation of the character complained of in this case can be justified at all, it can only be justified on the ground that a state of war existed between the United States and Germany, and that the United States Government, in the exercise of its police power for the protection of its citizenship, was not restrained by the Fifth Amendment to the Constitution of the United States.

In the case of Elwood Hamilton, Collector of Internal Revenue v. Kentucky Distilleries & Warehouse Co., U. S. Adv. Ops., 1919-1920, page 113, this Court used the following language:

> "That the United States lacks the police power, and that this was reserved to the states by the 10th Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the State of its police power, or that it may tend to accomplish a similar purpose. Lottery case (Champion v. Ames) 188 U. S. 321, 357, 47 L. Ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; McCray v. United States, 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. Rep, 769, 1 Ann. Cas. 561; Hipolie Egg Co. v. United States, 220 U. S. 45, 58, 55 L. Ed. 364, 368,

31 Sup. Ct. Rep. 364; Hoke v. United States, 227 U. S. 308, 323, 57 L. Ed. 523, 527, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Seven Cases v. United States, 239 U. S. 510, 515, 60 L. Ed. 411, 415, L. R. A. 1916D, 164, 36 Sup. Ct. Rep. 190; United States v. Doremus, 249 U. S. 86, 93, 94, 63 L. Ed. 493, 496, 497, 39 Sup. Ct. Rep. 214. The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations (Ex Parte Milligan, 4 Wall, 2, 121-127, 18 L. Ed. 281, 295-298; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 Sup. Ct. Rep. 622; United States vs. Joint Traffic Asso. 171 U. S. 505, 57I, 43 L. Ed. 259, 288, 10 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49, L. Ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; United States vs. Cress, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 Sup. Ct. Rep. 380); but the 5th Amendment imposes in this respect no greater limitation upon the national power than does the 14th Amendment upon state power (Re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519, 534, 10 Sup. Ct. Rep. 930; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. Ed. 246, 250, 26 Sup. Ct. Rep. 66). If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may for a permitted purpose impose a like resrtiction consistently with the 5th Amendment without making conpensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

Notwithstanding this language, however, the Court made it perfectly clear that before the United States Government could exercise its police power and transgress the 5th Amendment to the Constitution of the United States, the emergency which gave rise to such legislation must actually exist. The Court said:

"Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it."

Our contention is that the purchase and sale of wearing apparel, and the profits derived therefrom, by a retail merchant upon October 22, 1919, and at the time of the filing of the original bill in this case, bore absolutely no relation whatsoever to any state of war which may or may not have existed between the United States and Germany; that before the United States Government could exercise its police power the emergency must actually exist and should be urgent, and that the power should not be exercise beyond what the exigency actually required.

The exact question was presented in the case of Raymond v. Thomas, 91 U. S. 712, 23 L. Ed. 434. In that case, at the conclusion of the Civil War, but while South Carolina was still occupied by the military authorities of the United States for the purpose of reconstruction, a military commander, acting under the United States statutes, issued a decree forbidding the institution of civil suits for the enforcement of private claims. One of the state courts of South Carolina, in violation of the order, entered a decree, and the military commander, acting under what he assumed to be his authority therefor, entered an order purporting to set the decree aside. This Court, however, held that the order in question which was complained of bore no such relation to the emergency which existed as justified the same; and further held that such emergency acts should never be pushed beyond what the exigencies of war demanded. The Court used the following language:

"We have looked carefully through the Acts of March 2nd, 1867, and July 19, 1867. They give very large governmental powers to the military commanders designated, within the states committed respectively to their jurisdiction, but we have found nothing to warrant the order here in question. It was not an

order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity, regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, of any purpose to wrong or oppress, or of any indiscretion whatsoever.

The meaning of the legislature constitutes the law. A thing may be within the letter of a statute, but not within its meaning; and within its meaning, though not within its letter. (Stewart v. Kahn, supra).

The clearest language would be necessary to satisfy us that congress intended that the power given by these Acts should be so exercised.

It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires. Mitchell v. Harmony, 13 How. 115; Warden v. Bailey, 4 Taunt. 67; Mostyn v. Fabrigas, 1 Cowp. 161; S. C. 1 Smith, L. C. Pt. 2, 934. Viewing the subject before us from the standpoint indicated, we hold that the order was void."

So, we claim in this case that upon October 22, 1919, no emergency existed which justified the Act of Congress as a war measure and in the exercise of its police power to pass any act having to do with the profits made in the purchase and sale of wearing apparel.

The bill shows, and the Court takes judicial notice, that actual war between the United States, its allies, and Germany, terminated in November, 1918; that the military and naval forces of the United States and its allies at once began to demobilize, and, upon October 22, 1919, the military forces of the United States Government were practically demobilized. Upon the 22nd day of October, 1919,

and the date that the original bill in this case was filed, the United States Government had ceased all war time activities; it had discharged the Committee charged with the duty of fixing the price of coal; it had relieved the censorship over telegraph and telephone companies, and turned these utilities back to their owners; at the time of the filing of the original bill in this case the railroads had been turned back to their owners, and about that time the organization for the regulation of the price of grains had been dissolved. The United States Government, as a war measure, was no longer interested in the basis of profit had by merchants in the sale of wearing apparel.

It is a well-known fact, of which the Court will take judicial knowledge, that the Government for the use of its soldiers was purchasing no wearing apparel at that time. Upon the other hand, upon the date that the armistice was signed the United States Government had on hand enormous supplies of wearing apparel, and upon October 22, 1919, and at the date of the filing of the original bill in this cause, it was, and had been for months, a large vendor of these same commodities. Therefore, we respectfully submit that the Congressional enactments complained of cannot be justified as war measures or as a legitimate exercise of its police power on the part of the United States Government.

In the exercise of its war power, that is to say, in the demobilization of its army, and in carrying on such war time activities as were necessary in the protection of its citizenship, arising out of war, the United States Government was not interested in the profits which a merchant might make on a lady's crepe de chine dress, men's and boys' suits of clothes, ladies' and misses' suits and dresses, and men's and boys' or ladies' and misses' hats. Yet, according to the allegations of this bill and the admissions arising therefrom, we find the United States Government in May, 1920, at the time the original bill was filed, taking active steps to indict and bring to trial these complainants for refusing to conform their basis of profit to the margin

of profit arbitrarily fixed, or claimed to have been fixed, under the Lever Act and the amendments thereto.

Our position is simply this: That even if it be conceded that the United States Government, in the exercise of its police power and as a war measure, could pass regulation affecting and regulating the price of commodities having reference to a state of war, that such legislation must necessarily be limited to the exigencies thereby required, and that Congress could not, under the guise of a war measure, regulate the prices of commodities bearing absolutely no relation whatever to a state of war. In other words, that the measure did not become a legitimate war measure merely because Congress so designated the Act.

Upon the other hand, this Court has the right, and it is its duty, to examine the Act and see as to whether or not it bear such relation to a state of war as justifies its passage and enforcement. The question presented is a judicial question and not a legislative question, as will appear from the citations hereinafter made.

The case of Elwood Hamilton v. Kentucky Distilleries & Warehouse Company, supra, decided by this Court December 15, 1919, does not militate in any manner against our contention. At the time of the passage of that Act and at the time of the institution of the original bill in that case, the United States Government had a large standing army and navy; the sale and distribution of intoxicating liquors, as is and was known to all men, injuriously affected the morale, as well as the morality of the army; it was of vital importance to the Government that the physical and moral condition of our soldiers and sailors in time of war be protected by appropriate legislation. We might go further than that and say that it would appear to us that so long as the United States government, even in time of peace, has an army and navy, for the protection, morality and well-being thereof, it would have the right to regulate, or even prohibit, the manufacture and sale of intoxicating liquors. But certainly, in a time of war, in this age, the authority could hardly be questioned.

In other words, the manufacture and sale of intoxicating liquors bore a direct relation to such state of war as actually existed. When we turn, however, this standard which has been fixed by the Court to the acts complained of in this original bill of complaint, we find that they bear no such relation to any war time activities as justifies the Acts complained of as legitimate police measures on the part of Congress.

In other words, we respectfully submit that the basis of profit charged for men's collars, ladies' crepe de chine dresses, boys' and men's suits, and ladies' and misses' dresses, in May, 1920, bore no relation whatsoever to any state of war, and were clearly beyond the exigencies which justified any such legislation.

We desire, in this connection, to direct the attention of the Court to the very recent case of Holter v. Boyle, 263 Fed. 14. In that case it appears that the Legislature of the State of Montana passed an act regulating and affecting the prices at which all merchandise should be sold. The enforcement of the Act was enjoined in the District Court of the Unted States in the State of Montana, and the Court held that the Act could not be justified as a war measure, because it embraced so many commodities having no relation to any state of war. The Court used the following language:

> "This construction of Constitutions is virtually a rule of property and a principle of government, not to be changed by legislatures or courts in any circumstances, but only by the people by constitutional amendment. The other Legislatures and Congress, during the war enacted like laws, demonstrates that Montana's Legislature does not stand alone, but no more. It may be observed Congress proceeds under the war power, which is also subject to constitutional limitations, subject to the "due process" clause of the Fifth Amendment. Hamilton v. Warehouse Co., supra.
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> It may be further observed that, however it might be if the enactment was limited to the prime necessities and was a war measure, it is inconceivable that

its all-embracing provisions, now when the war is over, save as a fiction perpetuating rather dictatorial powers, are necessary to public health, peace, and safety. It ranges from the street corner vendor of popcorn and banana to the merchant prince, from coal to diamonds, from the babe's first swaddling band and cradle to the aged man's shroud, his coffin, and his grave. Trifles, necessities, luxuries—all are within its scope. As a whole the enactment would accomplish a complete reversal of the American system of business economics that has prevailed from the Nation's birth. True, there is no federal control over any state in the matter of economic theories it will pursue, provided not counter to constitutional limitations. But that involved here goes beyond economics, and virtually invades and changes the methods, if not the system, of government. Who will question the wisdom of the Constitution that this shall not be done, save by three-fourths of the states in concert?"

This Court has repeatedly held that as to whether or not the enactment of state legislation is a legitimate exercise of its police power, or merely pretends to be such and violates the Fourteenth Amendment to the Constitution of the United States, or that the question as to whether or not an Act of Congress is a legitimate exercise of the constitutional authority conferred upon it, presents a judicial question and this Court has exercised its right to examine the act itself, with all the circumstances of its passage, and to determine for itself as to whether or not the act complained of was a valid exercise of the power purported to be availed of.

We would call the attention of the Court to the rule, which, of course, will not be denied, that the Fourteenth Amendment to the Constitution of the United States restricts state legislation and the Fifth Amendment to the Constitution of the United States restricts Congressional legislation, and cases cited in respect to one amendment are applicable to the other. Such was expressly held by

this Court in the case of Elwood Hamilton v. Kentucky Distilleries & Warehouse Company, supra.

The identical question was present in the case of Lochner v. State of New York, supra. In that case the constitutionality of a labor law of New York forbidding adults from working in bakeries for more than a certain number of hours daily was sought to be justified on the ground that it was the exercise of the police power of the State. This Court used the following language in holding that the Act violated the Fourteenth Amendment to the Constitution of the United States, and had no reference to any legitimate exercise of the police power of the State of New York.

> "The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one in which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of persons or of free contract. Therefore, when the state by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right of labor or the right of contract in regard to their means of livelihood between persons who are **sui juris** (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the state.
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> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the

purpose of protecting the public health or welfare, are in reality, passed from other motives. We are justified in saying so, when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States, must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862. The court looks beyond the mere letter of the law in such cases. Yick Wo. vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064."

The case of William Adair v. United States, 208 U. S. 161, 52 L. Ed. 436, is directly in point. In that case there was presented for review an act of Congress forbidding an interstate railroad company from discharging an employee because he was a member of a labor union. This congressional enactment was sought to be justified on the ground that Congress had the right to regulate interstate commerce. The Court held that the Act violated the Fifth Amendment to the Constitution of the United States; that while the Act purported to regulate interstate commerce, as a matter of fact it had no relation thereto; that under the guise of regulating interstate commerce the right of contract was interfered with. The Court used the following language:

"Looking alone at the words of the statute, for the purpose of ascertaining its scope and effect, and determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress, it is difficult to perceive

why it might n not by absolute regulation, require interstate carriersrs under penalties to employ, in the conduct of its intererstate business, only members of labor organizations, o or only those who are not member of such organizatiitions which could not be recognized as existing uncnder the Constitution of the United States. No suchch rule of criminal liability as that to which we have e referred can be regarded as, in any just sense, a reregulation of interstate commerce. We need scarcely re repeat what this court has more than once said, that it the power to regulate interstate commerce, great anand paramount as that power is, cannot be exerted in vi violation of any fundamental right secured by other pr provisions of the Constitution. Gibbons v. Ogden, 9 Wheaeatly. 196, 6 L. Ed. 23, 70; Lottery Case, 188 U. S. 321, 4747 L. Ed. 492, 23 Sup. Ct. Rep 321."

The case of W. C. C. Hammer, United States Attorney, v. Dagenhart, 247 U. S. S. 251, 62 L. Ed. 1101, presented a very interesting question. n. Under the guise of regulating interstate commerce, Conongress passed an Act prohibiting the employment of minoriors in factories for more than a certain number of hours dailaily, and providing that no goods manufactured should be sh shipped in interstate commerce where the Act was violated.ed. The Act was passed and sought to be maintained as one ne regulating interstate commerce. This Court held, however, er, that the Act had no such relation to interstate commerce ee as justified its passage, using the following language:

"In interprepreting the Constitution, it must never be forgotten thathat the nation is made up of states, to which are intrusrusted the powers of local government. And to them and nd to the people, the powers not expressly delegated to the he national government are reserved. Lane County v. Or. Oregon, 7 Wall. 71, 19 L. Ed. 101. The power of the stastates to regulate their purely internal affairs by such lh laws as seem wise to the local authority is inherent, at, and has never been surrendered to the general governmnment. New York v. Miln, 11 Peters, 102, 139, 9 L. Ed Ed. 648, 662; Slaughter-House Cases, 16

Wall. 36, 63, 21 L. Ed. 394, 404; Kidd v. Pearson, supra. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have either authority or disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This Court has no more important function than that which develoves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states—a purely state authority. Thus, the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons, we hold that this law exceeds

the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed."

Even if it be true that in time of war, and as a war measure, Congress could pass an act regulating the prices of commodities, such act should necessarily be limited to commodities bearing some material relation to the power sought to be exercised. Under the guise of exercising such a right, a law regulating the purchase and sale of commodities bearing no relation thereto, should not be enacted and cannot be justified. The right and the exercise thereof are measured by the necessity therefor; the right and the exercise thereof are limited by the actual necessity, and the exercise of the right should not be pushed beyond the exigencies of the occasion.

The basis of profit had by retail merchants for the sale of wearing apparel on October 22, 1919, bore no relation to any state of war which existed, and Congress could not make such legislation bear any such relation by merely labeling it as "war time legislation." The Court judicially knows that no such exigency as justified the legislation complained of existed. It must be borne in mind that the plaintiffs in error in this case dealt only in wearing apparel. In other words, no other article regulated by the Lever Act was purchased or sold by them, and for that reason we confine our argument to the legality of the Act as represented by wearing apparel alone.

III.

SECTION 4 OF THE ACT OF OCTOBER 22, 1919, VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT CITIZEN IS NOT INFORMED AS TO THE NATURE OF THE OFFENSE; THE ACT IS TOO VAGUE AND UNCERTAIN TO FORM THE BASIS OF A CRIMINAL PROSECUTION.

So far as this discussion is concerned, Section 2 of the Act of October 22, 1919, prohibited the following: "To make any unjust or unreasonable rate of charge in hand-

ling or dealing in or with any necessaries." The Act contains no provision as to what basis of profit shall be received. It provides no standard as to what shall be considered an unjust or unreasonable charge. It is perfectly apparent from the Act that the question as to what facts constituted the crime, as well as to the question as to whether or not the facts had been committed by a defendant would necessarily be left solely to the discretion of the jury. In other words, under the Act, the jury would have to decide, not only as to whether or not the defendant was guilty of committing the things which were criminal, but would also have to decide what things were criminal. Not only that, but the same act would be innocent in one community in the same state, and a crime in another. But that is not all. A merchant in a town may have purchased an article for ten dollars and sold it for twenty, and the jury might decide that under the statute a crime had been committed; another merchant in the same town may have purchased the same identical commodity for eighteen dollars and sold it for twenty-five dollars, and the jury might infer that no crime had been committed. The trouble about the section is that it is vague and indefinite, and furnishes no proper standard for determining the guilt or innocence of any defendant, but leaves both the law and the facts to the jury for their own determination.

The question was presented for the first time in this Court in the case of United States v. Reese, 92 U. S. 214, 23 L. Ed 563. An act of Congress prohibited election officers preventing any person from voting on account of his race. The Act provided that any person desiring to vote could make an affidavit that he had been wrongfully denied the right to qualify, and it should be taken as if he had complied with all the law; thereupon, a failure to allow him to vote was made a crime. The Court held that the act was too vague and uncertain, using the following language:

> The elector under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of

the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not be unnecessarily placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongul act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination, on account of race, etc., subjects himself to prosecution, if not punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense and provide for its punisment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

The question was next presented in this Court in the case of International Harvester Company v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284. A statute of the State of Kentucky made it a crime to combine and fix the price of any commodity above its market value. The Court held that

the act was too uncertain for enforcement, using the following language:

> "This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be adjudged by it. It is our opinion it cannot stand."

The question was next presented in this Court in the case of Collins v. Kentucky, 234 U. S. 634, 58 L. Ed. 1510. The Court held as being too vague and uncertain a Kentucky statute making it a crime to sell pooled tobacco with-

out the consent of the agent of the pool, citing International Harvester Company v. Kentucky, supra.

A very similar question was presented in the case of Louisville & Nashville Railroad Company v. Railroad Commission of Tennesee, 19 Fed. 679. That case was heard before three District Judges, and was on application for injunction preventing the enforcement of an act of the legislature of Tennessee to define the duties of the Railroad Commission, and was for the purpose of preventing the Railroad Commission of the State of Tennessee enforcing the provisions of the Act. Among other things, the Act made it a crime for a railroad company to require more than a just and reasonable compensation, and required them to avoid unjust and unreasonable discrimination, and punished criminally a violation of the statute. It was held that the statute was too uncertain for enforcement, and the Court used the following language:

> "The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offense for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—**First**, the taking of 'unjust and unreasonable compensation;' and, **secondly**, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, **quasi** criminal, be predicated thereon? It was expressly held to the contrary in the case of Cowan v. East Tenn., V. & G. R. Co., decided a few years since, at Knoxville, (but not reported), because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' an rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent the finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part

of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a standard of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the measure of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice. Hence, the statute under consideration undertakes to supply this desideratum by which juries are to be governed in the determination of the questions submitted to them. That standard is 'that no rates or charges for service in the transportation of freight over any railroad, shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings * * * from its passenger and other traffic would not amount to more than a fair and just return on the value of which such railroad roads with its appurtenances and equipments to be assessed for taxation.'"

The case last above cited was approved by this Court in the case of John M. Stone v. Farmers' Loan and Trust Company, 116 U. S. 307, 29 L. Ed. 636. In differentiating the Tennessee statute from the Mississippi statute, the Court used the following language:

"It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. The statute of Tennessee which was under consideration in Louisville & Nashville Railroad

Co. v. Railroad Commission of Tennesee, 19 Fed. Rep. 679, is materially different from this in many respects. That case was decided before this statute was passed, and it is not at all unlikely that the Legislature of Mississippi made use of the decision in framing their bill so as to avoid some, if not all, of the objections which, in the opinion of the court, were fatal to what had been done in Tennesee. The argument on this branch of the controversy contains much that might have been useful if addressed to the Legislature while considering the bill before its final enactment; but we find nothing in it to show that the statute as it now stands is altogether void and inoperative. When the Commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

A statute almost identical with the statute in question was involved in the case of Louisville & Nashville Railroad Company v. Kentucky, 99 Ky. 132, 35 S. W. 129, 33 L. Ed. 209, 59 Am. St. Rep. 457. In that case the Kentucky statute made it a crime for any railroad company to collect or receive more than a just and reasonable rate for the transportation of passengers or freight. The Company was indicted under the statute, and the Supreme Court of Kentucky held that the statute was incapable of enforcement, using the following language:

"The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in Sections 816 and 819 of the Kentucky Statutes. The first-named section reads as follows: 'If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or the use of any railroad car upon its track or upon any track it has control of, or has the right to use in this state, it shall be guilty of extortion.' Section 819 fixes the penalty for

the first offense at not less than $500 nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into and through which the road runs and the Franklin circuit court are given jurisdiction of the offense, the prosecution to be by indictment, or action in the name of the commonwealth, upon information filed by the board of railroad commissioners. That this statute leaves uncertain what shall be deemed 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

This court gave approval to the case last cited in the case of Waters-Pierce Oil Company v. State of Texas, 212 U. S. 86, 53 L. Ed. 417. In that case the Court had under review a Texas statute which punished criminally acts

which were reasonably calculated to have the prohibitive result, and in this Court the case of Louisville & Nashville R. R. Co. vs. Kentucky, supra, was cited in support of the contention of plaintiff in error that the statute was too uncertain for enforcement. This Court, however, used the following language, by which we think it lent its approval to the doctrine announced in the Kentucky case:

> "In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not. Among others, Tozer v. United States, 4 inters. Com. Rep. 245, 52 Fed. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the circuit court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is Chicago & N. W. R. Co. v. Dey, 1 L. R. A. 744, 2 Inter, Com. Rep. 325, 35 Fed. 866, also decided by Justice Brewer at circuit. And also the case of Louisville & N R. Co. vs. Com. 99 Ky. 132, 33 L. R. A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for, under such an act, it rests with the jury to say whether a rate is reasonable, and makes guilt not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as to the statutes condemned in the cases cited."

The question was presented in the case of Capital Traction Company, 34 App. Cases, D. C., 592. In that case

the Act of Congress required the street railway companies to accommodate all persons desirous of using cars without crowding the said cars, and punishing failure so to do, was held too indefinite and uncertain for enforcement. The Court used the following language:

> "In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation, should not admit of such a double meaning that the citizens may act upon the one conception of its requirements and the courts upon another. As was said in U. S. v. Reese, 92 U. S. 214, 23 U. S. (L. Ed.) 563: 'If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committting a crime. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'
>
> Penalties cannot be inflicted at the discretion of a jury. Before the citizen can be deprived of his liberty or a corporation of its property by the imposition of fines, the crime must be clearly defined by the law-

making power. If the Congress has power to declare it a crime for street railway companies in the District of Columbia to operate cars in a crowded condition, it must, in order to impart validity to the law, declare, with certainty, what constituted, under the statute, a crowded car. This it has totally failed to do.

It is unnecessary for us to consider in this case the power of the Insterstate Commerce Commission to supply, by rule or regulation, what the statute lacks. No such attempt has been made; hence the question is not before us. The judgment of the police justice sustaining the motion to quash the information is affirmed, and it is so ordered."

In the case of Stoutenburgh v. Frazier, App. Cases (D. C.), 48 L. R. A. 220, it was held that an Act of Congress defining as a crime a suspicious person was too vague and indefinite for enforcement.

In the case of State v. Gaster (La.) 12 So. 739, which presented for construction a statute of the State of Louisiana punishing an officer guilty of any misdemeanor in office, the Court held that the statute was too indefinite, using the following language:

"We are bound to hold that this statute, which punishes misdemeanors in office without defining it, and imposing on the judges, as Mr. Livingston says, 'not only the judicial task of apportioning what shall be the punishment, but also the legislative duty of declaring what acts shall be misdemeanors,' violates the Constitution of the State, and can, therefore, furnish no foundation for this prosecution.'"

So, in this case, there will be devolved upon the jury the duty of determining what acts shall constitute crimes, and also determining whether or not the acts have been committed.

The question is also illustrated in the case of Augustine v. State of Texas, 96 A. S. R., 765. In that case the statute punished the acts of two or more persons having combined to commit murder by mob violence. The Supreme

Court of Texas held that the Act was too uncertain for enforcement, using the following language:

> "As we have seen, the act is not complete within itself, but we are required to appeal to another law, to-wit, the law of murder, in order to explain and give it force; but the law of murder furnishes no light as to what the legislature intended by mob violence, and we appeal to all other laws on our statute books in vain to ascertain what the legislature meant by the term 'mob violence.' To hold that the act was intended to embrace every killing by two or more persons in pursuance of a previously formed design to kill, or to inflict some injury which resulted in killing, would lead to grave results, evidently never intended by the legislature, calculated to produce complication and confusion, and which, while remedying no evil, would destroy rights and create vexations and oppressions. The effect would be not only to haras the citizen by requiring him to be prosecuted in some other county than where the offense was committed, in a great number of cases, evidently never contemplated by the legislature, but would impair the efficiency of the law and the administration of justice in the courts, if we gave such latitude of construction as is here claimed. As presented, we believe that the act in question is so indefinitely framed, and is of such doubtful construction, that it cannot be understood, either from the language in which it is expressed or from any written law of this state. We have given this question much thought and study, and we confess to being unable to solve the difficulty, and to determine what the legislature really meant by the term 'mob violence,' or what character of cases they intended the act should embrace. It is so uncertain in its terms as to escape intelligent construction, and we therefore declare it inoperative and void. Now, if this be a correct interpretation of the law, it settles this case, and it is not necessary for us to discuss whether or not, if the act was operative, it would be retroactive,

and render nugatory all prosecutions against mobs for murder begun before the passage of the act in question. There being no error in the record, the judgment is affirmed."

We refer the Court to the case of Ex Parte Jackson, 45 Ark. 158, in which case a statute making it a misdemeanor to commit any act injurious to health, public morals, etc., was held to be too vague and indefinite to afford a basis for criminal prosecution.

The identical acts involved here were declared unenforceable by the District Court of the United States for the Eastern Division of Michigan in the case of Detroit Creamery Company v. Kinnane, 264 Federal 845, wherein the Court used the following language:

"Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such an offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate

have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to the expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?"

The same was held by the District Judge for the Eastern District of Missouri, in the case of United States v. Cohen, 264 Federal 218, wherein the Court used the following language:

"The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonabl act, or a wrongful or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil, which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any

necessity for a stated percentage increase in price beyond cost and carriage should be a punishable crime. At least such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness and uncertainty which is dangerous, beyond excusing, to the property and liberty of innocent men."

The attention of the Court will doubtless be directed to the case of Standard Oil Co. v. United States, 221 U. S. 106, 31 Sup. Ct. Rep. 502, 55 L. Ed. 619; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. Rep. 780, 57 L. Ed, 1232; and the following distinguishing ear-marks are present:

(a) The statutes dealt with terms having a fixed common law meaning;

(b) As to whether or not an agreement was in restraint of trade, or in violation of the statute under construction was a judicial question presented to the court for its determination, and not to a jury, as in the present case;

(c) The facts constituting a violation of the statute in one locality would also be a violation in every other locality where the statute was enforceable; whereas, in the present instance all three essentials of certainty are lacking;

(1) The terms "unjust and unreasonable charge" have no fixed and definite meaning at common law;

(2) The question is not a judicial question for the determination of the court, but it would devolve upon the jury to determine the facts necessary to contsitute the crime, as well as to whether or not the acts constituting the crime had been committed;

(3) An act committed in one portion of the state would not be punishable in another portion, or the same might apply to different acts in one and the same community.

In the case of United States v. Cohen, supra, District Judge Faris used the following language:

"The case of Standard Oil Co. vs. United States, supra, was a civil proceeding by injunction and for dissolution into its constitutent elements for monopolization and restrain of trade, and it was not a criminal proceeding, such as is this at bar. The statutes upheld in the Standard Oil Case upon an attack analogous to this (or so far analgous as a civil case may be to a criminal one) were sections 1 and 2 of the so-called Sherman Anti-Trust Act. Section 1 and 2, Act of July 2, 1890, c. 647, 26 Stat. 209 (comp. Stat. Sections 8820, 8821). These section denounced and declared unlawful all monoplies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common-law definitions and crimes of engrossing and monopolizing. Since the above case was not a criminal one, but a civil action, no occasion arose therein for any reference to, or consideration by either court or counsel of, the provisions of the Sixth Amendment to the Federal Constitution, and none such was made.

Neither was the case of Waters-Pierce Oil Co. v. Texas, supra, a criminal case, but a civil case in the nature of quo warranto. The trial thereof in the Texas state courts was had under certain statutes of that state, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the Sixth Amendment, but that phase of the Fourteenth Amendment touching due process of law, was alone involved. Water-pierce Oil Co. v. Texas, supra, 212 U. S. loc. cit, 111, 29 Sup. Ct. Rep. 220, 53 L. Ed. 417. While the attack involved the alleged vagueness and indefiniteness of the Texas statutes, these statutes clearly defined a monopoly. Waters-Pierce Oil Co. v. Texas, supra, 212 U. S. loc. cit. 99, Sup. Ct. 220, 53 L. Ed. 417. For the rest, what is said

touching the Standard Oil Case, supra, applies also to the Waters-Pierce Case.

The case of Nash v. United States, supra, was, however, a criminal case under Sections 1 and 2, supra, of the Sherman Anti-Trust Act. The indictment in the Nash Case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspiracy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and thereafter fell out of the case.

In the course of the opinion in the Nash case, it was pointed out that no overt act—nothing, indeed, beyond the bare conspiracy itself—need be either charged or proven; that the Sherman Anti-Trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act, by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies, and contracts in restraint of trade. 3 Coke Inst. 181, c. 85; 1 Hawkins, P. C. c. 29; 5 and 6 Edw. VI, c. 14; Standard Oil Co. v. United States, 221 U. S. loc. cit. 51, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; Ann. Cas. 1912D, 734. Just here the quary may logically arise as to where at common law is there any crime defined or denounced as 'making an unjust or unreasonable charge in dealing in any necessary?'

After the Nash Case was rule, the Supreme Court of the United States again had occasion to refer to it, and distinguished it, in a case arising under the Constitution and laws of the State of Kentucky. International Harvester Co. v. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284. Plaintiff in error in the above

case was convicted and fined in the courts of the state of Kentucky under certain statutes passed, pursuant to provisions of the Kentucky Constitution, which permitted the Legislature to enact such laws as might be necessary to prevent all trusts 'from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.' The statutes passed by the Legislature of Kentucky made it unlawful to enter into any combination for the purpose of controlling prices, 'unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article.' The Supreme Court of the United States held that neither the Constitution of Kentucky, nor the statutes above referred to, and passed pursuant to the Constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. International Harvester Co. v. Kentucky, 234 U. S. 223, 34 Sup. Ct. 853, 58 L. Ed. 1284.

Distinguishing the Nash Case from what was said in the International Harvester Case, the Supreme Court said:

"We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377 (33 Sup. Ct. 780, 57 L. Ed. 1232), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree, what is an undue restraint of trade. That deals with the actual, not with an imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice makes it comparatively easy for com-

mon sense to keep to what is safe. But, if business is to go on, men must unite to do it, and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing condition were other than they are, to an uncertain extent, to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess. 234 U. S. 223, 34 Sup. Ct. 855, 58 L. Ed. 1284.

While no reference was made by the Supreme Court in the above excerpt to the fact that common-law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-Trust Act) were being dealt with in the Nash Case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, bring this case into that class represented by the Kentucky statutes, rather than the common-law class represented by the Nash Case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky case. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is therefore no better than lynch law."

IV.

THE ACT IS UNCONSTITUTIONAL, IN THAT CERTAIN OCCUPATIONS ARE EXEMPT FROM ITS OPERATION.

Section 2 of the Act of October 22, 1919, contains the following provision:

That this Section shall not apply to any farmer, gardner, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, in respect to the farm products produced or raised upon lands owned, leased, or cultivated by him."

We respectfully submit that this provision invalidates the entire Act. It is elementary that criminal statutes should be universal in their application. The direct question was decided in this Court in the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540. The Court in that case was construing an Illinois statute condemning trusts and combinations, which exempted from its operation agricultural products or live stock while in the hands of the producer or raiser. This Court, in the strongest language, condemned and held invalid any such statute, using the following language:

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that **if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and lixe stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statuate, criminal, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the presribed penalty.** Under what rule of permissible classification can such legislation be sustained as consistent with

the equal protection of the law? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State."

V.

NO CRIMINAL PROSECUTION CAN BE BASED UPON THE ACT BY REASON OF THE FAILURE OF COMPLAINANTS TO CONFORM TO THE PRICES FIXED BY THE FAIR PRICE COMMISSIONERS. A MERE DEPARTMENTAL RULING, ORDER OR REGULATION CANNOT BE MADE THE BASIS OF A CRIMINAL PROSECUTION, UNLESS EXPRESSLY SO PROVIDED BY STATUTE.

The bill of complaint alleges that the State Fair Price Commissioner and City Fair Price Commissioner have fixed a certain basis of profit to which complainants in error are expected and required to conform the operation of their businesses. The proclamation will be found on pages 10 and 11 of the Transcript.

It is shown by the allegations of the bill of complaint that the margin of profit fixed by the Fair Price Commissioners in no case exceeds thirty-three and one-third per cent gross profit. The allegations of the bill of complaint are that on the previous year's business the complainants, while conducting their business on a higher basis of profit, probably about fifty per cent gross profit, were only able to make a net profit of about five per cent. (See original bill of complaint, pp. 20 and 21).

And the bill of complaint alleges that if the plaintiffs in error were obliged to conform to the margin of profits fixed by the defendants in error, that the business would be confiscated, and alleges, which allegations are admitted in this proceeding, that unless the plaintiffs in error adopt

the confiscatory basis of profits fixed by the Fair Price Commissioners and conform their business thereto, that they would be arrested, indicted and prosecuted, because they had violated a rule as to the margin of profit prescribed by the Fair Price Commissioners.

And the bill alleges, and it is admitted in this proceeding, that they will be prosecuted for violating the regulations of the Commissioners. It is academic law that a mere department rule is not law, and that its violation cannot be made the basis of criminal prosecution, unless expressly so provided by statute.

The identical question was decided by the Supreme Court of the United States in the case of the United States v. Eaton, 36 L. Ed 591. In that case the United States statute provided for a tax on oleomargarine, and provided that the Secretary of the Treasury should make all proper rules and regulations for the collection of the tax, and provided criminal punishment for failure to comply with any duty imposed by law in respect thereto. The Department issued a regulation that the dealer keep a complete set of books in order that the amount of the tax might be readily ascertained and to make certain returns. This the dealer refused to do and was indicted for failure to comply with the regulation. The Supreme Court of the United States held that Congress, by express legislation, not having made violation of the regulation a crime, no crime was committed, using the following language:

> "It was said by this Court in Merrill v. Jones, 106 U. S. 466, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under Section 2505 of the Rev. Stat., which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe, that he had authority to prescribe a regulation requiring

that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed, or omitted, in violation of a public law, either forbidding it or commanding it.

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law,' in the carrying on or conducting of a business of a wholesale dealer in Oleomargarine, in such a manner as to become a criminal offense punishable under Section 18 of the Act; particularly, when the same act, in Section 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section, or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for the wholesale dealer in oleomargarine to omit to keep books and render returns, as required by regulations, to be made by the commissioner of internal revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Section 41 of the Act of October 1, 1890.

Regulations prescribed by the President and by the heads of departments, under authority granted by

Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The question was again presented in the case of United States v. Maid, 116 Fed. 650. In that case the defendant was indicted for perjury in making a homestead entry. He was required by the department which had authority to make rules and regulation concerning entry of land to make an affidavit that the lands were not mineral lands. He made such an affidavit, which was false, and was indicted thereon. The court held that there was no crime committed because the act of Congress did not require that the affidavit in question be made, using the following language:

"Thus it will be seen that the contest before the local land officers, by reason of which the supreme court of the United States in Caha v. U. S., supra, held such officers to be a competent tribunal, within the scope of Section 5392, although originally provided for in department regulation, had frequent recognition by acts of Congress. In the case at bar, materiality of the affidavit set out in the indictment and its authorization by a law of the United States, are essential elements of the crime sought to be charged. To hold that said elements exist when there is no statutory requirement or authority for the affidavit, and solely because of Rule 24, above mentioned, assuming now that said rule is not repugnant to any act of Congress, would make the rule a part of the law defining perjury, and thus admit what all the authorities deny,—legislative power in the executive branch of the government. Whether or not the indictment is sufficient in failing to allege that the lands in question contained valuable mineral deposits it is unnecessary to determine

in view of the conclusion above announced. The jurisdictional objects to the indictment are not well taken. See opinion filed this day in U. S. v. Peuschel, (D. C.) 116 Fed. 642."

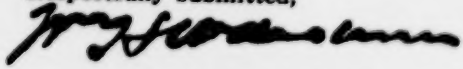
VI.

INJUNCTION THE PROPER REMEDY.

The statutes being unconstitutional, it necessarily follows that injunctions prayed for should have been granted. Ex parte Young, 209 U. S. 123, 52 L. Ed. 174; Western Union Telegraph Co. v. Andrews, 216 U. S. 165, 54 L. Ed. 430; Philadelphia Co. v. Stimson, 223 U. S. 607, 56 L. Ed. 572; Traux v. Raich, 239 U. S. 33, 60 L. Ed. 131.

We respectfully submit that the decree of the Court below should be reversed, and the cause remanded, with directions to issue the injunction prayed for.

Respectfully submitted,



Counsel for Plaintiffs in Error.

SUBJECT INDEX.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 367.

R. E. KENNINGTON ET AL

v.

A. MITCHELL PALMER ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, JACKSON DIVISION, SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLANTS.

Supplemental Statement of Facts.

Complainants and appellants (hereinafter called appellants), R. E. Kennington, Union Department Store, and R. E. Kennington Company. Defendants and appellees (hereinafter called appellees), A. Mitchell Palmer, Attorney General of the United States; H. E. Figg, United States Fair Price Commissioner; T. J. Locke, Fair Price Commissioner for Mississippi; S. J. Taylor, Fair Price Commissioner for

Jackson; Julian Alexander, United States attorney for the Jackson Division; H. M. Fulgham, assistant therein.

Certain questions are covered by associate counsel. To present the questions discussed, this supplemental statement is made.

The cause comes by direct appeal, upon constitutional grounds, from decree dismissing appellants' bill.

The Original Bill.—The parties litigant are as stated. Federal jurisdiction was predicated upon a controversy involving the requisite amount, and rights and privileges arising under:

(*a*) Divers provisions of the Federal Constitution (*inter alia*):

(1) Article I, section 1, vesting in Congress legislative power;

(2) Article I, section 8, subdivision 11, vesting therein war power;

(3) Article III, section 2, subdivision 1, defining Federal judicial authority;

(4) Article IV, section 4, requiring a republican form of government to be guaranteed;

(5) Article VI, section 2, making the Constitution and statutes enacted in pursuance thereof the supreme law of the land;

(6) The Fourth Amendment, guaranteeing safety and security in property and papers against unreasonable searches and seizures;

(7) The Fifth Amendment, wherein—

(*a*) Liberty and property are not to be taken without due process of law;

(*b*) Nor private property taken for public use without just compensation;

(8) Amendment VI;

(9) Amendment IX and Amendment X;

(*b*) The act of Congress to provide for the national se-

curity and defense, passed August 10, 1917; the amendments thereto of October 22, 1919, extending its provisions, hereinafter called "Lever Law;"

(c) Divers proclamations under assumed powers thereunder alleged to be derived, and especially the pronunciamento of the Mississippi Fair Price Commissioner, in these words:

> "Fair price committees are advised that the Commissioner for Mississippi has this thirtieth day of April fixed and does hereby promulgate the following maximum prices and maximum margins of profits which a retail merchant handling the following named articles of merchandise may charge, and these prices and margins of profit are based on actual, original cost, plus freight or express, and war tax, and they are maximum; merchants may sell for less." (Here follow prices listed, R., p. 10.)

Appellants for many years operated high-grade department stores (Tr., 5), and have a large business, fairly remunerative, now threatened with destruction unless appellees are enjoined from continuing their unlawful activities (Tr., 6). By uniform fair treatment a valuable property in goodwill and going value is now owned (Tr., 6).

The enactment of the Lever Law is detailed (Tr., 8 and 9). Thereunder appellees, as to price fixation, instituted a system of espionage (Tr., 12) and sought to compel the production of all invoices, etc., and when appellants dared maintain their constitutional prerogatives, they were by appellees published as "profiteers."

Locke, who promulgated said pronunciamento, has no experience in operating a department store; is utterly ignorant of the elements integrated into the proper conduct thereof, and said Taylor, who participated therein, is substantially in the same category (Tr., 13).

There are many stores in active competition with appellants.

"* * * In each of the departments * * * wherein no change in the stock is requisite to co-ordinate it with the whims of fashion and to obviate other extraordinary conditions, complainants have always, are now, and will continue to ask, a profit less than that assumed to be established by respondents" (appellees). "In divers of their departments, more especially millinery and women's ready to wear, there are constantly changing modes, to comply wherewith" (Tr., 13) "involves the rendition of additional service by appellants, wherefor reasonable compensation must be made, as each of said departments should to them have allocated all expenses therein incurred. As to said departments there are published in New York, Paris, and elsewhere certain illustrated magazines purporting to give in advance the styles which publications circulate among appellants' patrons, and which are conflicting and confusing in the extreme. In order to render this service, appellants must buy in advance, utilizing their offices in New York, Paris, and other means hereinafter set out therefor. A rare ability, commanding a large salary, is required by those in position to anticipate the vogue at a future date, and to select those articles which, in addition to being a hat or a dress, will embody style, and to that end appellants are expending large sums in foreign markets, where such things are first displayed, diligently endeavoring to winnow out of the variegated conglomerations that which will possess style and which will at a future date appeal to feminine fancy.

"That between producers of this merchandise the output is not uniform, each several producer seeking for personal aggrandizement to individualize his output so as to make this individualism the vogue, and should any such individualism be ignored by appellants and thereafter become the vogue, the penalty would be the loss of the patronage of this class of buyers and the serious impairment of appellants' good will. In said business there is a great money risk in operating a style shop. In order to render this service, which is separate and apart from selling goods as goods, and which alone appellees have considered, it is essential that there be added to the usual out-of-

pocket cost the following, which appellees have wrongfully ignored:

"(*a*) Actual cost of going to, remaining at, and keeping in touch with the market and every part thereof.

"(*b*) Adequate high salaries commensurate with this class of ability.

"(*c*) Actual buying in advance of that which is hoped to be stylish and disposing thereof in due course.

"(*d*) Being luxuries and near luxuries, a forecasting of the ability of its purchasers to buy, predicated upon the condition in this section of the cotton crop.

"That appellants' businesses in these departments are with women, who have very definite opinions of that which is stylish, predicated upon the aforesaid publications and divers others, and should appellants procure in advance styles that would not be worn they would be absolutely unsalable, and that which the public demands of appellants is that they offer for sale that which is stylish when it is stylish; and that appellees have placed this service and the goods themselves upon the same selling basis as those goods which are sold to appellants over the counter, and appellants aver that wrongfully appellees have assumed to take jurisdiction over the complete field covered by that which is denominated 'wearing apparel,' embracing the furnishing of style, and have wrongfully assumed to place the business of appellants under their jurisdiction, and it is only by having what these followers of fashion are willing to buy when they want to buy it that appellants can stay in business. And that those desiring to buy a hat as a hat, or a dress as a dress, *sans* style, are able to get the same at a price less than the original cost of acquisition to appellants, while those who insist upon having a hat plus style, and a dress plus style, are willing to and must be willing to pay a sufficient amount to allow the dealer therein trafficking to earn a profit therefrom, and appellants aver that said appellees have no power to control the prices paid for the rendition of said service in furnishing style in said several departments; but, notwithstanding this, have wrongfully assumed juris-

diction thereover and are holding appellants up as profiteers to the public, when they are performing this service and charging therefor that which the public is willing to pay, and over which service said appellees are wholly without jurisdiction. Said goods so offered are not in anywise affected with a public use, and the acquisition of such commodities, plus the style, is merely the gratification of a feminine whim, and appellees are wholly without power, despite their acts to the contrary, to take from these appellants for the private gratification of the fancy of their customers their private property without just compensation for private use. An analysis of each of these sales shows that there is a sale by appellants of the actual goods made, and also in the sale the rendition of a service which, as a completed whole, is requisite in each of these departments, and the right thus to sell style, when disposing of the materials expressing it, is a property right wherein appellants have invested large amounts of money and which cannot from them be taken contrary to the Federal Constitution.

"Appellants further aver that they are entitled to indemnity against the loss irretrievably incident to such a business, and, in being a purveyor of style, must be allowed to dispose of those commodities that do not express it at a loss that must be allocated against the purchase price of the goods sold profitably; and that when thus conducted the business yields only a reasonable profit in some stores, and in others almost none" (R., 13, 14, 15).

"The replacement values of divers commodities owned by appellants is greater than the retail price whereat they are now being sold, notwithstanding. under such list, total income must be still further reduced.

"Appellants have the constitutional right to convert their property at a reasonable wholesale value plus a reasonable retail profit thereon" (Tr., 16). "Due to the possession of a stock of goods wherein there has been an uplift, a large amount of paper profits apparently have accrued to appellants, but this must be set aside as a reserve to absorb the loss which will inevitably occur due to the possession of a similar stock

of goods when the prices of such goods purchased at the present abnormal cost have again returned to their former levels; and appellants are entitled to retain this apparent paper profit as a reserve against said decline, and should the demands of appellees be complied with by a conversion at the prices fixed the result will be the destruction of appellants' businesses, and when the abnormal prices are restored that apparent uplift in values will be completely eliminated and appellants will be possessed of but the same stock of goods. Appellants are but taking from their businesses an amount equal to their normal profits as a distributor, leaving said paper profits apparently accruing to continue in the business to insure its solvency, which will be destroyed if appellants are not vouched the rights therein sought.

"That the United States Government, and said appellees, have no jurisdiction whatsoever over luxuries and near luxuries, wherein appellants deal; but notwithstanding said want of power, said appellees have wrongfully assumed jurisdiction over appellants' businesses with reference thereto, and will, unless restrained, continue so to exercise said trespasses, as hereinbefore set out, as to deprive appellants of their said constitutional rights.

"The exercise of such assumed authority by appellees is actual, arbitrary, and in violation of the Federal Constitution" (Tr., 17).

"Should all sales made by appellants be in accordance with the price fixation in all instances, appellants would do business at an actual loss" (Tr., 20-21).

"A detailed cost analysis is annexed as to R. E. Kennington Company, showing a net profit of 5.8 per cent on the entire turnover, Federal taxation alone consuming 5.6 per cent" (Tr., 30).

"Appellees have assumed to fix the profit on all staple and fancy dry goods, which are in no sense 'wearing apparel'" (Tr., 21).

"The prices fixed have no reference whatever to the basis of profit necessary to yield a reasonable return, are lower than in any other State in the American Union; entirely ignore reproduction value, and are

predicated solely upon original cost, disregarding all other elements" (Tr., 21).

"Appellees are wholly without power so to do, and the exercise of their assumed authority ignores losses directly attributable to variations in style, progressive unsalability, and other necessary elements, and is based upon the economic impossibility of 'making each separate and independent sale stand upon its own facts, without reference to the entire * * * business, or any line or department thereof" * * * (Tr., 22).

Appellees autocratically sought to injure appellants, holding them up as "profiteers," and directed their proceedings directly against appellants, because they were large merchants, and sought to coerce thereby the smaller merchants.

Appellees have inflicted irreparable damage upon appellants, are continuing the same, and seek to cause indictments for failure to correlate their prices to said list. The constitutional rights are averred, and their violation set forth at length; and relief in equity against their infringement is sought.

Upon the hearing for a preliminary injunction, the court, *sua sponte*, dismissed the bill, but granted a direct appeal.

POINTS.

I.

The district court was vested with power to dismiss, sua sponte, the bill after it had determined the legal remedy adequate.

II.

As a court of equity, the district court had jurisdiction, as—

(1) *The Lever Law was challenged as unconstitutional;*

(2) *The fixation of prices thereunder was challenged as in excess of Federal statutory authority by reason of—*

(*a*) *No jurisdiction over style;*

(*b*) *No jurisdiction over all of the commodities sought to be affected;*

(*c*) *The disregard of essential cost elements integrated in buying, holding, and distributing, essentially allocable to the several services.*

III.

Fixation of prices void, as—

(*a*) *Unauthorized;*

(*b*) *No judicial hearing vouchsafed whereunder reasonableness is determinable.*

IV.

The Lever Law unconstitutional and departmental enforcement illegal, because—

(*a*) *Violative of the Fifth Amendment, in—*

(1) *Taking private property for private use without due compensation;*

(2) *Depriving appellants of liberty and property without due process of law.*

(*b*) *Violative of the Sixth Amendment with reference to rights thereunder vouchsafed.*

(c) Unauthorized at present under Article I, section 8, subdivision 11, the war power, because—

(1) Not in a territory wherein war was flagrant;

(2) Limited as to property and liberty involved by the Fifth Amendment;

(3) The scope of the law, especially the departmental interpretation thereof, far broader than the Constitution allowed;

(4) The power now terminated;

(d) Article IV, section 4, whereunder each State must be guaranteed a republican form of government;

(e) Article VI, section 2, whereunder the Constitution and enactments in pursuance thereof are the supreme law of the land.

(f) Where under Amendment Nine and Amendment Ten there shall be no disparagement of the powers reserved to the people and the several States.

POINT I.

The District Court Was Vested with Power to Dismiss, sua sponte, the Bill After It Had Determined the Legal Remedy Adequate.

On the application for the preliminary injunction the district court was of opinion that an adequate remedy existed at law; and thereupon it, *sua sponte*, dismissed the bill without prejudice and without pleading filed by appellees.

The practice is amply sustained (*Hipp v. Babin*, 19 How., 278; *Parker v. Winnipiseogee*, 2 Black, 550; *Wright v. Ellison*, 11 Wallace, 16; *Lewis v. Cox*, 23 Wallace, 470; *Minnesota v. Northern Securities Co.*, 184 U. S., 235; *Garzot v. Rice*, 209 U. S., 297).

POINT II.

As a Court of Equity, the District Court Had Jurisdiction.

The Lever Law is challenged as unconstitutional; the fixation of prices in pursuance thereof is challenged as in excess of Federal statutory power.

Under these circumstances a court of equity will enjoin.

The right to test (*a*) the constitutionality of a statute and (*b*) the question of usurped authority thereunder, by enjoining the parties charged by law with the exercise of these powers, is settled beyond question (*Rhode Island v. Palmer*, No. 29, original; *State of New Jersey v. Palmer*, No. 30, original; *George C. Dempsey v. Bogatow, U. S. attorney; Kentucky Distilleries, etc., v. Geary, U. S. attorney; Figenspan, a corporation, v. Bodine, U. S. attorney; Sawyer, U. S. district attorney, v. Products Co.; Brewing Association v. Moore, collector*, decided June 7, 1920, — U. S., —; Adv. Shts.,* 613. *See, also, Green v. Frazier*, — U. S., —; Adv. Shts., 625; *Ft. Smith, etc., R. R. Co.*, — U. S., —; Adv. Shts., 630).

In *Hammer v. Dagenhart*, 247 U. S., 251, a bill was filed to enjoin the enforcement of a Federal statute, and the jurisdiction was sustained without question.

In *Wilson v. New*, 243 U. S., 331, a similar decision was made. *See, also, Ex parte Young*, 209 U. S., 159.

There can be no doubt of the power of a court of equity to enjoin appellees, although occupying official positions, from attempting to enforce an unconstitutional statute against the

*Advanced sheets Co-operative Publishing Co.

appellants in excess of their lawful authorities, causing to appellants threatened and resultant irreparable injury. See *Creamery Co. v. Kinnane,* 264 Fed., 851, citing, to follow, *Philadelphia Co. v. Stimson,* 223 U. S., 605, where Mr. Justice Hughes said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. This exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded" (citing cases). "And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to State officers seeking to enforce unconstitutional enactments" (citing many cases), "and it is equally applicable to a Federal officer acting in excess of his authority, or under an authority not validly conferred" (citing many cases. See, also, *Waite v. Macey,* 246 U. S., 606; *McFarland v. Sugar Co.,* 241 U. S., 79; *Vicksburg Water Works Co. v. Vicksburg,* 185 U. S., 65).

And, furthermore, where the official asserting power conferred by a statute acts in excess thereof, such excessive action will be enjoined (*Gegiow v. Uhl,* 239 U. S., 3; *Waite v. Macey,* 246 U. S., 606; *American School v. McAnnulty,* 187 U. S., 94; *Morrow v. Jones,* 106 U. S., 466; *Bacon v. Rutland,* 232 U. S., 134).

In *Santa Fe, etc., v. Lane,* 244 U. S., 442, 498, it was declared:

> "On the contrary, if the demand was unlawful, * * * the complainant was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and,

of course, there was no remedy at law that would be as plain, equitable, and complete as a suit such as this against defendant." (See, also, *Truax v. Raich*, 239 U. S., 33.)

If, as we shall endeavor to demonstrate, this statute is (*a*) unconstitutional, or (*b*) the exercise of power thereunder in excess of that conferred, then under the foregoing decisions the remedy by injunction is without question.

POINT III.

Fixation of Prices Void.

The record shows that the Fair Price Commissioner in Mississippi issued this pronunciamento:

> "Fair price committees are advised that the commissioner for Mississippi has this thirtieth day of April fixed and *does hereby promulgate* the following *maximum prices* and *maximum margins of profit* which a *retail merchant* handling *the following-named articles* of merchandise *may charge*, and these *prices* and *margins* of profit *are based on actual, original cost*, plus freight or express and war tax, and *they are maximum;* merchants may sell for *less*.
>
> "Men's and boys' suits costing up to $25, margin of profit 33⅓ per cent; costing from $25 to $50, inclusive, margin of profit 35 per cent. The commissioner fixes no margins on suits costing merchant above $50.
>
> "Ladies' and misses' suits and dresses, same margin of profit as on men's and boys' suits.
>
> "Men's, ladies', and children's shoes costing up to $3, margin of profit 25 per cent; costing from $3 to $8, margin of profit 30 per cent; costing from $8 to $10, inclusive, 33⅓ per cent. The commissioner fixes no margin on shoes costing merchant above $10.
>
> "Men's and children's hats costing up to $5, margin of profit 30 per cent; costing from $5 to $10, inclusive, 40 per cent; all straw hats, margin of profit 40

per cent. No margin fixed on hats costing merchant above $10.

"Ladies' and misses' hats costing up to $5, margin of profit 30 per cent; costing from $5 to $10, margin of profit 40 per cent. No margin fixed on ladies' hats costing merchant above $15.

"Dry goods: The margin of profit on *all staple dry goods* is 33⅓ per cent; the margin of profit *on all fancy dry goods* is 40 per cent.

"Men's collars: The maximum price which may be charged for men's stiff collars (standard brands) is 25c." (Italics ours.)

This covers (*a*) a fixation of price *on actual original cost*, plus freight or express and war tax; (*b*) covers *all staple dry goods* and *all fancy dry goods*, and disregards the *rendition of services* in *operating* (*a*) *a style shop* (*b*) with reference thereto procuring those things requisite therefor, and (*c*) other factors in the statement delineated.

Under the Lever Law, the State Fair Price Commission has promulgated this price list, and has sought, and is seeking, to indict any person who departs from the appointed path. His capability was in question, his ability was impugned; yet the fixation of these prices was made absolute and any deviation denounced as a crime.

The right to fixation of prices does not exist under the present statute. The verbiage thereof is almost that of the original Interstate Commerce Act, wherein Mr. Justice Brewer, in *Interstate Commerce Commission v. Railroad*, 167 U. S., 505, said:

> "First. The power to prescribe a tariff or rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads of various companies engaged therein, the thousands of miles of road, the millions of tons of freight carried, the varying and divers conditions attaching to such carriage, is a power of supreme delicacy, and importance.

> "Second. That Congress has transferred such power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."

Furthermore, as there stated—

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable; that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future; that is a legislative act."

And, after reviewing the whole subject, the court concluded:

> "Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum, or absolute. As it did not give the express power to Congress, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just."

This judicial interpretation of words previously employed should be integrated into the construction of the present statute. (See, also, *Railroad Co. v. Commission*, 162 U. S., 184; *Interstate Commerce Commission v. Baird*, 194 U. S., 42.)

Notwithstanding the want of power, the Mississippi Fair Price Commission has, without a judicial hearing, promul-

gated rates—prices—which are absolute, and for non-conformity therewith, forthwith criminal prosecutions are commenced.

(*a*) Fundamentally, the fixation of a rate is a legislative function (*Minneapolis, etc., v. Minnesota,* 134 U. S., 467; *Ohio Valley Water Co. v. Borough,* — U. S., —; U. S. Adv. Shts., 585; *Oklahoma Operating Co. v. Love,* — U. S., —; U. S. Adv. Shts., 383; *Lake Erie, etc., v. State,* 249 U. S., 424; *Prentiss v. Atlantic Coast Line Co.,* 211 U. S., 210; *Missouri-Pacific R. R. v. Tucker,* 230 U. S., 347).

No authority was given, in any way, in anywise, to review the reasonableness of the proclaimed prices. There was the legislative fixation thereof by appellees, not assailable in any court, and for a violation of which appellees saw to it that appellants were visited with the most destructive instrumentality known to the American public, the classification as a "slacker" in war and as a "profiteer" in peace. The effect thereof is without adequate judicial admeasurements. The exercise by an official, subject to no control, biased by his status, ignorant of the proper factors to be integrated, makes the rights of appellants absolutely without safety, save they be vouchsafed the plenary protection uniformly accorded by this court, that in all such cases the exercise of such a power would be absolutely void; and so, without fear of contradiction, we classify the price-fixing list of appellee Locke.

As said in *Valley Co. v. Borough,* — U. S., —; Adv. Shts., 586:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character (citing cases). In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order is void because in conflict with the due-process clause, Fourteenth Amendment" (citing cases).

In *Oklahoma Operating Co. v. Love*, — U. S., —; U. S. Adv. Shts., 384, it was stated:

> "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order, and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory" (citing cases. See, also, *Missouri v. C., B. & Q.*, 241 U. S., 533; *Wadley Southern R. R. Co. v. Georgia*, 235 U. S., 651; *Minneapolis, etc., v. Minnesota*, 134 U. S., 467).

When Locke promulgated his price list, his action was legislative. To constitute due process under the Fifth Amendment, it was requisite that judicial investigation be vouchsafed, both as to the law and the facts. Failing therein, his pronunciamento was inherently void, as conflicting with fundamental constitutional inhibitions.

(*b*) But, in the pronunciamento issued, there was embraced all *staple* and *fancy dry goods*, irrespective of character, as "wearing apparel." There was no segregation or separation of that which was to be characterized as "wearing apparel" from that which was to occupy the category of staple and fancy dry goods (*U. S. v. American Woolen Co.* (Dist. Ct. N. Y.), 265 Fed., 404).

Appellants were required by the order to comply as to *all dry goods* save those which were sought to be eliminated from the express provision of the act by the declaration of the Fair Price Commission. The act, as drawn, applied to *all* "wearing" apparel; yet, in Mississippi, the Commissioner saw fit to limit the wearing apparel expressly embraced by the statute to "men's and boys' suits" costing the merchant not more than $50; to misses' and ladies' dresses costing the same; to shoes costing less than $10; to hats costing less than $10

for men and children, and for ladies costing less than $15. Despite the verbiage of the act, such are the limitations integrated by a ministerial officer. Such regulations must, to be valid, find support in the statute itself; and all departmental interpretations contradictory to or in excess of the statutory authority are void (*Gegiow v. Uhl*, 239 U. S., 3; *Gonzales v. Williams*, 192 U. S., 1).

When appellee Locke saw fit to limit the operation to certain prices, and then further to extend his authority to *all* dry goods, thereby he was guilty of flagrant deviations, both in inclusion and in exclusion, in this: That, if valid, he unduly narrowed the provisions of the statute, contrary to its terms; and, if valid, he unreasonably extended it to embrace a class whereover he was absolutely without authority, thus exemplifying the dangers incident to personal action without the fundamental control of constitutional limitations, thereby creating a government not of laws, but of men.

(*c*) Fundamentally, Locke disregarded elements necessarily integrated into the cost price of that specifically offered by appellants for sale. His lack of knowledge and want of capacity are mirrored in eliminating essential cost factors to be found in serving to the public those things which are expressions of a passing fancy.

It appears by the bill that appellants have operated a *style shop*, wherein those commodities, whereover Locke claims authority, in part, are utilized as a means of supplying an active demand of the women, co-ordinating their attire to the ever-changing demands of fashion. The importance of maintaining such an organization is shown and the expense therefor is detailed. Notwithstanding this actual existence of such operating cost, Locke (the Constitution to the contrary notwithstanding) has seen fit to arbitrarily prohibit the proper cost allocation, in conducting this business, to the department wherein such business is done.

As said in *Ft. Smith, etc., v. Mills*, — U. S., —; Adv. Shts., 631:

> "It was not decided * * * that Congress could or did require a railroad to continue in business at a loss."

In *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S., 212, the court said:

> "We are of opinion that the test applied was wrong, under the decisions of this court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage" (citing cases). * * * "The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it."

Turning to the decision covering the precise point in *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S., 585, 595, 599, 600, 604, this court says:

> "But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel a carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account."

Thereafter this court reviewed the decisions and concluded:

> "The constitutional guarantee protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity * * * has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied

> a reasonable reward for its services, after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

And, under similar circumstances, under the Fifth Amendment, that the United States would have exceeded its authority.

And in that opinion it said:

> "The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such apportionment, but when conclusions are based on cost, the entire cost must be taken into account."

So, when the Fair Price Commissioner came to deal with an article wherein a style element of cost was integrated, due to a New York connection or a Paris association, and a tendency to pass out after a brief vogue, he exceeded his authority by seeking to limit the profit with reference thereto to an amount wherein no such elements were integrated.

The *war power* cannot be extended to cover the question as to how women are to dress.

The want of capacity was reflected in the short-sighted promulgation of inappropriate principles to fundamental factors which could not possibly be eliminated from consideration (*Norfolk & Western Ry. Co. v. Conley*, 236 U. S., 605).

There is possessed by neither the United States nor its representatives the power to eliminate from the cost of doing a particular class of business those items necessarily integrated therein by the essential nature of the operation. There is no departmental power to repeal economic fundamentals.

POINT IV.

The Lever Law Unconstitutional, Especially the Departmental Interpretation Thereof in Mississippi, Because Violative of the Fifth Amendment, in—

(1) *Taking private property for private use without due compensation;*

(2) *Depriving appellants of liberty and property without due process of law.*

The section under discussion prohibits the exacting of "excessive prices for necessaries," and the departmental interpretation of the power is found in the pronunciamento. This contention challenges the validity of the act; but, should that be sustained, nevertheless the asserted exercise conflicts with the constitutional provision, in that property is required to be sold at less than its actual value. Reproductive cost is eliminated, and in lieu thereof, under espionage, a system of enforced distribution sought to be foisted upon a free people, wherein fundamental economic laws are eliminated. These contentions, therefore, conduct us back to a definition of liberty, the subject of the protection of the Constitution.

In *State v. Julow*, 31 S. W., 782, it was said:

> "These terms—'life,' 'liberty,' and 'property'—are respective terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the rights of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil, and political—in short, all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law (*Story Const.* (5th ed.), par. 1950). Now, as before stated, each of the rights heretofore mentioned

carries with it, as its natural and necessary coincident, all that effectuates and renders complete the full, unrestrained enjoyment of that right. Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract, and, also, of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination. In the case at bar, as will be remembered, the contract was not made for any definite period. From these premises it follows that *'depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision.'* (Italics ours.) (See, also, *People v. Otis*, 90 N. Y., 48; *State v. Goodwill*, 33 W. Va., 179; *Leep v. Railway Co.*, 58 Ark., 415.)

In *State v. Kreutzberg*, 90 N. W., 1109, it is said:

"It has become settled, for example, that liberty does not mean merely immunity from imprisonment, and that 'property' is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with the rights of others; and within the latter those rights of possession, disposal, management, and of contracting with reference thereto, which renders property useful, valuable, and a source of happiness, right to pursuit of which is preserved" (citing cases).

In *Van v. Edwards*, 67 L. R. A., 464, it was said:

"The word 'property' is of very broad signification. It is defined as 'rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. * * * Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods, or chattels, which no

way depends on another man's courtesy. * * * A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition. * * * *The right of property is that sole and despotic dominion which one man claims and exercises over the external things in the world in total exclusion of the right of any other individual in the universe.* It consists in the free use, enjoyment, and disposal of all of a person's acquisitions, without any control or diminution save only by the laws of the land.' (*Black, Law Dict., pp. 953, 954.*) * * *

"But the very word 'property' includes the very right of possessing, enjoying, and disposing of a thing, and when used subjectively, it means that with respect to which this right exists, or that which is one's own." (Italics ours.)

In *Wynehamer v. People*, 13 N. Y., 396, it was said:

"Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when man went into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained' (*Tomlin's Law Dict.*, Property, 2 *Bl. Com.*, 34). Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, *and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may frequently remain untouched.*" (Italics ours.)

"Nor can I find any definition of property which

does not include the power of disposition and sale, as well as the right of profit, use, and enjoyment."

* * *

"Chancellor Kent says (2 Com., 320): 'The exclusive right of using and transferring property follows as a natural consequence from the preservation and administration of the right itself.' And again (page 326): 'The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author, property is defined as 'an *exclusive* right to things, containing not only a right to use those things, but a *right to dispose of them either by exchanging them for other things*, or giving them away to any other person without consideration, or even throwing them away (*Bouvier's Law Dic., Tit.* 'Property'). These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made." (Italics ours.)

In *Block v. Schartz*, 65 L. R. A., 311, it was said:

"Property has some essential attributes without which we could not conceive it to be property. Among these are the use, enjoyment, susceptibility of purchase, sale, and of contracts in relation thereto. The taking away of any one of the essential attributes may violate the constitutional guaranty that no person shall be deprived of his property without due process of law as clearly as in the case of a physical taking without due process of law. An enactment, therefore, like the one in controversy, which deprives an owner of his liberty to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business may lawfully do, invades his rights guaranteed by the Constitution and cannot be upheld; and to prevent the free exchange and sale or disposal of property according to the immemorial uses of trade is to deprive it of one of its main attributes. 'The third absolute right, inherent in every Englishman,' said Sir William Blackstone,

in his classification of fundamental rights, 'is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land' (1 *Black. Com.*, 138). The right thus referred to and defined by the illustrious commentator is absolute and inherent in every American subject of the United States by virtue of the supreme law of the land. Therefore, 'When a law annihilates the value of property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power' (*Wynehamer v. People*, 13 N. Y., 378, 398). * * *

"In *Third National Bank v. Devine Grocery Co.*, 97 Tenn., 663; 34 L. R. A., 445; 37 S. W., 390, it is said: 'To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken.' In *People ex rel. Manhattan Savings Trust v. Otis*, 90 N. Y., 48, it was said: 'Depriving any owner of property or one of its essential attributes is depriving him of his property within the constitutional provision.' In *State v. Goodwill*, 33 W. Va., 179; 6 L. R. A., 621; 25 Am. St. Rep., 863; 10 S. E., 285, it was said: 'The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution.' * * * So, in *State v. Loomis*, 115 Mo., 307; 21 L. R. A., 789; 22 S. W., 350, it was observed: 'Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts.'"

These fundamental definitions have received the unqualified sanction of this court.

In *Allgeyer v. Louisiana*, 165 U. S., 578, it was said:

> 'The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere

physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of a citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley in *Butchers' Union, etc., Co. v. Crescent City, etc., Co.,* 111 U. S., 746, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 754 (589), the learned justice says: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.'" * * *

"Again, in *Powell v. Pennsylvania,* 127 U. S., 678 (32 L. R., 253, 256), Mr. Justice Harlan said: 'The main proposition advanced by the defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." (See, also, v. 17 *Revised Edition, Rose's Notes,* 921, showing the subsequent development of this declaration, especially *Lochner v. New York,* 198 U. S., 45; *Atkin v. Kansas,* 191 U. S., 207; *Lumber Company v. Dakota,* 226 U. S., 162; *Crane v. New York,* 239 U. S., 195.)

In *Adams v. Tanner*, 244 U. S., 596, where there is a review of the decisions, the court said:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public."
>
> See, also, *Truax v. Raich*, 239 U. S., 33.

Again, in *Insurance Co. v. Dodge*, 246 U. S., 374, the court said:

> "So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established."

See, also, *United States v. Knight*, 156 U. S., 1, where, as remarked by Chief Justice Fuller—

> "It is vital that the independence of the commercial power and of the police power and the delimination between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

All factors to be dealt with in this cause are State factors, wholly uncorrelated to war, totally co-ordinated to the State sovereignty. The assertion with reference to this particular form of authority would fall directly within the condemnation of the Chief Justice in that case at page 15—"A situation more paralyzing to the State governments, and more provocative of conflicts between the General Government and the

States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine," being a quotation from the opinion in *Kidd v. Pearson,* 128 U. S., 1.

See, also, *McFarland v. Refining Co.,* 241 U. S., 79.

If the statute does not, then the departmental interpretation integrates into the right of private contract, at Jackson, Mississippi, a governmental license, whereunder one of full age, desiring to sell to one of full age, desiring to buy, must have their agreement conform, not to their wills, but to that of the Price Commissioner. This individual, under assumed power, has entered our store, being thereunto not invited, and has, over our protest, without property rights in our goods, made his *ipse dixit* the measure of our right of disposition in every department where he saw fit to enter. These commodities were not affected with a war use; it was a time of peace, and he is assuming to act under the executive appointment and demanding that our private property be made subject to disposition, not at our will, but at his will. It is demanded that the owners, in virtue of such ownership, shall yield, under a contract made without consent, to another that which is their very own.

Thus, in America, there is a suspension of the right to contract, and a method of disposition is substituted whereunder private initiative is throttled and destroyed. If business is to be done, the right of assent, agreement, is taken away and in its room appears servile co-ordination to governmental formula. We are no longer free, but are under the tutelage of enthroned autocracy. America has been bereft of that which made the Yankee's fame world-wide. The right of private contract is paramount to Federal power, even when it seeks to make liberty subversive to actual war necessity.

To improve production, to stimulate distribution, the right of private contract is destroyed. I can no longer say, "I won't" when a price that is unsatisfactory to me is offered for

that which is mine, but must respond, "I will" when I mean "I won't." This passes the limit vouchsafed freemen and brings us well within the province of slaves. Initiative is destroyed; all are reduced to a formula; life is devoid of variety. The genius and the dullard must pursue the path appointed; all incentive to service has been eliminated by withdrawal of reward of merit. Not so under the declarations of this court. In *United States v. Freight Association*, 166 U. S., 320, it is said:

> "The trader or manufacturer carries on an entirely private business and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the articles in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses; he may cease to do business whenever his choice lies in that declaration." (See, also, *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S., 211; *Miles Medical Co. v. Park*, 220 U. S., 373; *United States v. Colgate*, 250 U. S., 307. See, also, *Adair v. United States*, 208 U. S., 161; *Coffage v. Kansas*, 236 U. S., 1.)

Therefore, with this right to property, to liberty, Congress has attempted to deny appellants the right to make a contract incident to the conduct of their business, wherein it is requisite to preserve the same from the disintegrating influences brought about by the present war and set forth at large in the bill of complaint.

It there appears, admitted by appellees, that appellants were the owners at the inception of the war of a stock of merchandise, actively engaged under a fixed policy of selling the commodities among customers. Due to said ownership, an uplift occurred reflecting paper profits due to such possession, but which paper profits have not been withdrawn from the business, but have been left there to continue, as a reserve, to insure its solvency when the stock of goods purchased at the higher figures shrinks back to the normal.

In short, such reserve will have been utilized as an insurance against an inevitable consequence of the present.

But this reserve is not excessive; its origin is delineated at length, and it accrues from the conduct of a well co-ordinated business, wherein the cost prices charged are, as to staples, less than those promulgated in the edict, but in certain departments they are larger, where the ignorance of the Commissioner failed to integrate the requisite amount necessary to maintain the buying forces in New York and abroad, the necessary depreciation due to the transient character of the demand, bottomed upon a style expression and other factors set out at large in the bill, whereto reference is made.

It appears that the Commissioner in issuing the edict saw fit to disregard and disallow, in taking jurisdiction of all things whatsoever composing staple and fancy dry goods, the fact that certain merchants bought for cash over the counter through drummers sent by sellers to seek business, and therefore in the selling price as cost of acquisition was found the cost of disposition by a producer to retailer; whereas in the case at bar, in the class of commodities under discussion—luxuries, semi-luxuries, feminine style—appellants sought the primary markets and there winnowed out of the mass offerings those which would appeal to their customers, and therefore took from the producer the cost element, *i. e.*, of selling through representatives; and yet the edict did not see fit to make any allowance for this essential difference.

The United States is a government of limited powers, integrated into the exercise of every one of which is the Fifth Amendment, operative by its express provision both in peace and in war, and whereby the Congress is incapacitated from doing that which shall deprive any person of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The admeasurement of the power of Congress is accurately reflected in the limitations upon the power of the States under the Fourteenth Amendment. *Shaffer v. Carter*, — U. S., —;

Adv. Shts., 241; *Hamilton v. Distilleries*, 251 U. S., 146, where this court unanimously declared:

> "The war power of the United States, like its other powers, and like the police power of the States, is subject to applicable constitutional limitations (citing cases). But the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon the State power."

The Commissioner in Mississippi has included within his jurisdiction *all* dry goods, staple and fancy, "necessaries" and luxuries. The character of the inclusion depends upon the expression of the personal delectation of the Commissioner; and thus he has entered our store, and there, upon each article embraced within its confines, impressed an arbitrary selling price, wherein reproduction value is disregarded; and he has integrated an expression of his will as a necessary factor in the disposition of every paper of pins embraced within our establishment. Conformity in each particular to the edict is requisite, notwithstanding war has not been flagrant in Mississippi, though the courts remain open, and the right of private contract under the Constitution been in nowise abrogated.

Here we have the conduct of a business wherein, by utilizing an expensively maintained corps of trained buyers outside of the State, we have sought to build up a trade with those who made the following of the fashions their principal occupation. The United States has not sought in anywise to prohibit the production of such commodities thus demanded by its citizens, though the applicability thereto of them for warlike purposes is of the utmost impossibility. The sheerest of fabrics, the most exaggerated of designs, seem to appeal; and yet Labor was allowed to produce. Capital was permitted to become integrated and proper distribution must be allowed, and it was known of all men that the disposition of such articles involved the outlay of an amount in

excess of the percentages fixed in the edict. Thus the constitutionality of a regulation of the sale of that which was the gratification of a personal whim is sharply brought in question. In fine, is the regulation of feminine fashion a necessary war measure, when the power of the United States is limited to carrying on war, and not to defining what, to accentuate charms, shall be worn by the women of the land?

But one step further: In this store, owned absolutely, is property where, due to *the inflation of the currency,* there has been a rise in the *conversion value*—the dollar expression—over the amount at which goods were originally bought. But the amount of the excess of the dollar expression, translated into those things that appellants would have, would not now reach those which could have been purchased if the conversion had occurred at the date of the original acquisition. In short, the utilization of the uplift at its height will not be adequate to bring into our possession lawfully that which could have been brought had we sold when the goods were first purchased and when the currency was not inflated. Despite the inflation, the edict reads that *cost price* is the controlling factor; and all monetary changes are brushed aside by the will of the Commissioner.

One step further: We have in our establishment, owned absolutely, property whose *conversion value* is 100 per cent over what it was when it was originally acquired. Forming a part of the same stock, we have other articles of the same character bought as their market price advanced, all indiscriminately mixed, each capable of being bought by a purchaser, all of the same quality; and yet, under the edict, we, though a one-price store, must sell to one customer at one price, to another at another price, and yet to another at still a third price. Our allocation must be accurate; we must not confuse goods purchased at one time with goods purchased at another. The Commissioner is absolute in his orders—*cost price, plus*—whenever a sale is made. His edict says that these prices are fixed and must be conformed to, thus inte-

grating his will into our business to transform it from a one-price store, marked in plain figures, to a many-price store, impairing irretrievably the value of our good-will, built up through years of labor, involving thousands of dollars of expense.

One step further: We have *goods* whereof we were the owners, paid for in full, which in the fullness of time *have advanced in value*, which we cannot replace for less than an amount 100 per cent over their original cost. With this uplift we have had no connection whatever; it accrued in virtue of our ownership. That it will disappear is probable, nay, certain, if we continue to own; and if we convert at the present price and reinvest, as we are compelled to do in our business, necessarily when normal prices are restored we shall be possessed of the same commodities, the same stock, neither richer nor poorer, save for garnering our legitimate distributor's margin. In fine, nothing is more uncertain and calls for greater caution on the part of a merchant than the violent fluctuation wherewith he is now called upon to deal. Unlike the manufacturer, he cannot cover his purchases by short sales, so as to insure his manufacturer's profit; but from the period of purchase to the period of disposition he must take the risk of declines, of vacillations, of collapse of the market. To overcome these differences, serious in the extreme, we assert that we have the inalienable right of private contract. The goods wherewith we deal are not necessaries—at least, so far as this controversy is concerned—but the expressions of style, which are changing every day.

Furthermore, a business of the magnitude of appellants' is not a thing that can stand still; it cannot cease to operate; its going value is property; its good-will is property (*Denver v. Water Co.*, 246 U. S., 191; *Gas Co. v. Des Moines*, 238 U. S., 153), wherefor, compensation, if taken, must be made under the Fifth Amendment. We cannot cease to do business. This would mean the disintegration of our establishment. And yet this law, as interpreted by the Commissioner,

has so integrated his personal opinion into every contract which we make as to require that, if we conform thereto, our business be foreordained to destruction, our property be taken by the Government without compensation.

One step further: We have purchased a commodity whose dollar expression has advanced in value, so that its replacement cost is, say, 100 per cent more than the original. Now, this article is desired to be purchased by one employed by the railroads, whose salary has been increased at the present time adequately to cover the advance in the cost of living. In justice, having received this advance at the hands of the Federal Government, in virtue of its power, duly exercised, can he, who has so thus profited, demand of appellants that appellants shall sell this commodity, whose price has thus advanced, to this employee at the pre-war price when such employee, in virtue of the Federal power, has caused his compensation to be so raised as to reflect the advance in replacement value? By what authority can those who have thus profited deny to the one who has continued to be owner the right to convert in accordance with the standard fixed by the Federal authority that whereof he has through all this period continued the owner? All men are created free, are created equal, so the great Declaration runs; and if so it be, does that instrument, whose object is to form a more perfect union, establish justice, insure tranquillity, take from that equality, destroy that freedom, so that, before the law, there is one measure of right for one, while there is another measure for another? Under what authority has the wage-earner, when his wages under Federal power have been increased to reflect the uplift in the cost of living, to demand of appellants, who purchased this property and therefor paid, that property be to them surrendered upon a pre-war basis, so as not to mirror the uplift whereunder the wage award was made?

In short, having been vouchsafed the full amount of uplift, can the law now add thereto this additional profit, whereunto the owner has always heretofore been entitled?

One step further: An absolute owner of property, wherefor the full price has been paid, continues such possession. Can he be deprived of the operation of the fundamental economic law when so to do will unsettle all things?

One step further: Appellants are possessed of a suit of clothes, wherefor they have paid, the reproduction cost of which is $20, wherefor they have paid $10. John Smith into their store comes. Can he demand that this suit of clothes, of a replacement value of $20, be to him given upon a basis of $13.33 under the edict issued? Where does the $6.66 replacement value—our property—go under this act? And by what authority can the rights of a purchaser, a person, be magnified at the expense of the rights of the seller, a person, so as to compel us, the owner, to give to him, who is not the owner, that whereof we are now lawfully possessed? The actual replacement value of our property is $20; its actual cost was $10, due to purchase at an anterior time. Eliminate inflation of currency and all other factors, and we challenge squarely and flatly, under the Federal Constitution, the right to say to us, a citizen, that we shall to another give property at less than its replacement value. Be the power what it may, at all times and at all seasons it is subject to the Fifth Amendment. It operates upon all instrumentalities, upon all persons (*Telegraph Co. v. Los Angeles*, 227 U. S., 278; *Ex parte Milligan*, 4 Wallace, 121-127; *Monongahela Navigation Co. v. United States*, 148 U. S., 336; *McCrary v. United States*, 195 U. S., 61; *United States vs. Cress*, 243 U. S., 316; *Hamilton v. Warehouse Co.*, 251 U. S., 146).

The right of private contract, the right of private property, are the inalienable rights, the absolute rights, of every Englishman under Magna Charter, of every American under the Constitution. It is not under any circumstances the right of either the President, or of Congress, to say unto one that they should give unto another property whereof the first was lawfully possessed. The United States has never, at any time, sought to take from any man any property without making

full compensation to him. The right has been vouchsafed at all times and at all seasons; has been fundamental, in times of war as well as in times of peace.

One step further: We have an actual open-market selling price of a commodity covered by the Lever Law, covered by the Commissioner's edict. That open-market selling price is above the original cost—for the sake of this argument, excessively so; but the price has been fixed by the interplay of economic laws, irresistible, indestructible, and the question now presented is whether, despite the property in appellants vested in those things whereof they are the absolute owners, wherefor they have paid, with reference to which they have incurred these hazards, can they now, contrary to their will, against their consent, be made to donate the excess over a reasonable profit, over original cost, to one who might desire to purchase?

Operation of our store must continue; the property in the form of good-will is ours; from us it cannot be taken.

Denver v. Water Co., 246 U. S., 191, *supra*.

Gas Co. v. Des Moines, 238 U. S., 153, *supra*.

The proposition is, we must sell; the expense of doing business compels it. And can, in the face of this expense, the law say that we shall disregard replacement value, actual open-market value, and *give* to one who would buy? There is no winking the fact that where a purchaser comes and there finds goods of a fixed, open-market value, if he takes these goods without leaving the open-market value, that he has taken our property, and that, too, without our consent.

In short, this law has to that extent assumed to nullify the right to contract, to abrogate the inalienable function of free will. There is a prohibition against Federal taxation without apportionment. Far better would it be to *donate* to the Government than to instill into the citizens the conception of obtaining property without therefor paying its full value. Honesty in transactions between man and man by this law

is imperiled; all of the baser forces, qualities, and tendencies are called into being; something for nothing is the rule, and in its attendant train there can be no return to the conception of an honest day's work for an honest dollar. The entire theory is at war with the restitution of normal economic operations. But the power of the Government does not embrace the power to take from one and give to another. Is not this the rule of the Soviet?

To return to our example: A suit of clothes, present replacement value, open market, $20; original cost, $10; reasonable profit fixed, 33⅓ per cent; total price allowed, $13.33. What are we going to do with the $6.67? Under the law, by ownership it belongs to appellants. Appellants desire to sell their property (must sell to keep their store open), whose replacement value is $20; this edict says we shall not receive but $13.33 therefor. What of the remainder? Instantly upon receiving it the purchaser could dispose of it for $20. Our contention is that John Smith, the purchaser, cannot be vouchsafed the benefit of this $6.67 under the constitutional limitations heretofore announced by this court.

In *Savings & Loan Ass'n v. Topeka*, 20 Wallace, 662, it was said:

> "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the

judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B (*Whiting v. Fond du Lac*, 25 Wis., 188; *Cooley, Const. Lim.*, 129, 175, 487; *Dill., Mun. Cor., sec.* 587)."

And then, again, the learned Justice Miller, at page 665, said:

"The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town" (citing to approve *Allen v. Jay*, 60 Me., 124; *Lowell v. Boston*, 111 Mass., 454).

In *Cole v. La Grange*, 113 U. S., 1, the head-note prepared by Mr. Justice Gray stated:

"The general grant of legislative power in the Constitution of a State does not authorize the legislature, in the exercise of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object."

Again, in *Madisonville Traction Co. v. St. Bernard*, 196 U. S., 252; 49 L. Ed., 462, it was said:

"There ought not to be any dispute, at this day, in reference to the principles which must control in all

cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments" (citing cases). "If the purpose be public, the taking may be outright, provided reasonable, certain, and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner" (citing cases). "Any State enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment" (citing cases). "The position taken by the highest court of Kentucky on this general subject appears from *Tracey v. Elizabethtown, L. & B. S. R. Co.*, 80 Ky., 259, 269. It was said there: 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity for the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.'"

Again, in *Green v. Frazier*, the same principle was recognized, the court quoting, to adopt, *Fallbrook Irrigation Dist. v. Bradley*, — U. S., —; Adv. Shts., 627:

> "Concluding the discussion of that subject the justice said: 'In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under State authority for any other than a public use, either under the guise of taxation or by the assumption of

> the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government.' Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled."

See, also, the approval of the *Topeka case,* page 629:

> "There was no right under any circumstances to take property without due process" (*Ft. Smith, etc., v. Mills,* — U. S., —; Adv. Shts., 630; *Brooks-Scanlon Co. v. R. R. Commissioner,* 251 U. S., 396).

To recapitulate: We have an original purchase at market price of $10 for a suit of clothes; there has been an uplift in the market price to $20; the replacement value, whereon the railroads are allowed to earn (*United States v. Commission,* — U. S., —; Adv. Shts., 367), is $20. Now, the owner of this property, whose dollar expression is twenty, without his consent, contrary to his wishes, but due to the autocratic dictation of this alleged law or of the alleged lawgiver, is compelled to sell this property at $13.33 and to vest in the purchaser thereby $6.67, which lawfully accrued to appellants in virtue of ownership. To preserve appellants' property status, they must pay $20 for a suit to replace the one sold for $13.33, and thus personally supply the $6.67 governmentally donated to John Smith. Has our Government ceased to be a government of laws and become a government of men?

Appellants did not derive their rights of disposition from the United States; they came, if from any government, the State of Mississippi. Therefore, as to these articles, we submit that the Lever Law is unconstitutional; but if not, that its interpretation is so vicious as to be made the subject of injunction against those seeking its excessive and wrongful enforcement.

POINT IV (b).

Lever Law Unconstitutional, Especially Departmental Construction Thereof, Because Violative of the Fundamental Guaranties Vouchsafed by the Sixth Amendment.

We subscribe to all contained in associate counsel's admirable brief; but there is an additional thought.

The prohibition is exaction of excessive prices for "necessaries." This is made a crime, if not violative of the Constitution. It was not a crime at common law. The exercise thereof was a right of property, as heretofore shown. The fixation, therefore, of the exercise of an innocent right as a violation of the public welfare is an importation of the times of personal government.

What is the exaction of an excessive price? Excessive as to whom, the buyer or the seller? Excessive as to what, time of acquisition or time of disposition? Excessive how, as an individual sale or as a sale integrated into the conduct of a general business? Excessive when, at the time made or at the close of the fiscal year, when the general balance sheet is struck? A criterion by definition of the crime is a constitutional requirement.

The legislature must prescribe a *definite standard;* each factor therein must be integrated by the legislature expressly, so that in the punishment therefor the courts will not be called upon to legislate.

Note appellants' turn-over, aggregating roughly a million dollars. Each article when sold bears a fixed relation to the total turn-over. Cost accounting, due to appellants' excellent management, has an accurate allocation, so that each department stands upon its own bottom and bears its own burdens. Allocation has been accurately made, presumptions have been controlled by facts, and a well established business built up, whose every function has been co-ordinated; but these are

now sought to be disintegrated and its existence destroyed by appellees under this vicious law; or, if not, by their construction of it.

As said in *Board of Trade v. Christie,* 198 U. S., 247:

> "But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain."

The total profit shown on the turn-over is 5.8 per cent, as against the amount paid the Government, as taxes, 5.6 per cent.

The act nowhere specifies how the factors of replacement, reproduction, obsolescence, individual sale as contradistinguished from a sale co-ordinated with other sales, shall be dealt with. In the statute there is no expression by the legislature as to each of these factors.

To revert: Appellants maintain high-salaried men in New York, connections in Paris, to procure certain classes of commodities first hand; other merchants buy from drummers, possibly, the same commodities. What is selling cost in one is buying cost in the other. Price fixation is but rate-making, and involves all of those uncertain factors wherewith this court is so familiar, beginning with the *Ames case,* 169 U. S., 466.

Now, the fixation of rates is not a matter of simple cost accounting, but must have integrated into it the ability to sell when there is a demand for the commodity, because people cannot be made to buy, despite the law endeavoring to compel the appellants to sell.

The fixation of a rate is a legislative act wherein the legislature must integrate all factors which are there to be placed (*Ohio Valley Water Co. v. Borough,* — U. S., —; Adv. Shts., 586; *Oklahoma Operating Co. v. Love,* — U. S., —; Adv.

Shts., 383; *Lake Erie, etc., v. Public Utility Commission*, 249 U. S., 424; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S., 210; *Chicago, etc., R. R. v. Minnesota*, 134 U. S., 418).

The bill shows confiscation, and therefore, with the fixation challenged, as taking property without due process, the Constitution has vouchsafed a judicial hearing, both as to the law and facts, to ascertain the correctness of such rate; and where such legislative act fails to vouchsafe such a hearing it is void (*Ohio Valley Co. v. Borough*, — U. S., —; Adv. Shts., 586; *Oklahoma Operating Co. v. Love*, — U. S., —; Adv. Shts., 383; *Lake Erie, etc., v. Public Utility Commission*, 249 U. S., 424; *Missouri v. Chicago, etc., R. R. Co.*, 241 U. S., 538; *Wadley Southern R. R. Co. v. Georgia*, 235 U. S., 651; *Missouri-Pacific R. R. Co. v. Tucker*, 230 U. S., 347; *Chicago, St. Paul, etc., R. R. Co. v. Minnesota*, 134 U. S., 418).

These decisions uniformly condemn as unconstitutional every legislative fixation not judicially assailable without the incurring of fines and penalties. Constitutional guaranties demand a right to judicial review before the rate can be demanded, when the excessiveness is made a question. That the prices, rates, charged are not excessive is shown by the exhibit, and must be admitted. If they are reduced to conform to the statute, as interpreted, and the admirable correlation due to the genius of appellants in organizing their businesses is eliminated by the bungling edict, then we are foreordained to share the fate of a vast majority of merchants—bankruptcy.

POINT IV (c).

Lever Law, Particularly the Departmental Construction Thereof, Unconstitutional, Because Unauthorized by the War Power, in This, That (1) Not in a Territory Wherein War Was Flagrant, and (2) Limited as to Property and Liberty by the Fifth Amendment.

Under the decision of this court in *Connolly v. Sewer Pipe Co.*, 184 U. S., 540, discriminations are held violative of the Constitution when measured by this law. The sole justification for such discrimination can only be found in virtue of the alleged applicability of the war power, which, with deference, must be exercised in consonance with the Fifth Amendment.

The bill avers that the act, or, if not the act, then the departmental construction thereof embodied in the record, integrates into the disposition of every article sold in appellants' store the will of the lawmaking power, mirrored in an edict destroying free will upon the part of appellants in the disposition of their property. This act, or this departmental interpretation, integrates itself into the conversion of each article, and thereby limits the right of disposition of personal property carried in a department store, and the proposition involved is as to the right of thereby utilizing private property during the war period.

The United States was not in a condition of domestic violence; there was no suspension of ordinary methods of conducting business; the civil courts have not been designated as the instrumentalities of carrying on the war, if this act is to be justified thereby. All governmental functionaries sought to be vested with this plenary and overpowering authority are those created by the statute, deriving their functions under the Constitution and limited in their acts thereby. There is not in this act sought to be utilized the military

power, in any sense of the word. Martial law is not sought to be declared, but, on the contrary, is studiously avoided. This act must pass muster under the Constitution as applied to private property, not in time of actual war, but in places where the courts were open, discharging their normal functions without let or hindrance.

In re Egan, 5 Blatchf., 319, Mr. Justice Nelson, in defining martial law, declared:

> "All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers, and civil authorities, by the arbitrary exercise of military power; and every citizen or subject—in other words, the entire population of the country within the confines of its power—is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing or not, at his will. If permitted, it may be before a drum-head court-martial, or the more formal board of a military commission; or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

As stated in *Hare, American Constitutional Law*, Lecture XLII:

> "Martial law is something indulged, rather than allowed, as law, the necessity for discipline in our army being that which alone can give it countenance. And this indulged law was only to extend to members of the army, or those of the opposite army, and was never so much indulged as to be executed upon others; for others who are not listed under the army had no

color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war."

In *Smith v. Shaw*, 12 Johnson, 267, the limitation of martial law was confined strictly to those connected with the operation of the war, and did not extend to a citizen not subject to military authority.

The controlling case is *Ex parte Milligan*, 4 Wallace, 2, where, at page 118, the court said:

"The controlling question in this case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

"No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited

people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning."

The court then further said:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for

> the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

In concluding the opinion, this court said:

> "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overthrown and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one State, when in another it would be 'mere lawless violence.'"

Again, in *Bean v. Beckworth*, 18 Wallace, 510, the learned Justice Field said:

> "Nor do the pleas, whilst asserting that the acts, which are the subject of complaint, were done under the authority and by the order of the President, set forth any order, general or special, of the President, directing or approving of the acts in question.

> "For this last omission all the judges are agreed, without expressing any opinion upon the other omissions, that the pleas are defective and insufficient."

So, in the instant case, the allegation being admitted that there have been no proclamations by the President affecting the operation of this particular branch of the business, there is a right to enjoin those who are therefore left without authority.

Orders, especially directed, from the President as Commander-in-chief, are conditions precedent to the validity of the acts to be taken in war, and for this reason the appellees are wholly without the lawful power to proceed.

But, to return to the discussion with reference to private property in a territory where war is not flagrant, see *Mitchell v. Harmony*, 13 Howard, 115, where Mr. Chief Justice Taney said:

> "And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether anything short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public."

In answering that question, the Chief Justice said:

> "There are, without doubt, occasions in which private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.
>
> "But we are clearly of the opinion that in all of these cases the danger must be immediate and im-

> pending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

The court thus makes the criterion a judicial question.

In *McLaughlin v. Green*, 50 Miss., 453, the Supreme Court of Mississippi declared:

> "Private property is sacred from the violent interference of others, and whoever takes, injures, or destroys it is a trespasser unless he shows a justification. Necessity—extreme, imperative, and overwhelming—may constitute such justification; but expediency or utility will not answer.
>
> "*Justification under a plea of necessity is always a question of fact to be tried by a jury, unless the law-making department has provided some other mode* (*Hale v. Lawrence*, 1 Zab., 730; *Mitchell v. Harmony*, 13 How., S. C., 115, *supra*). If 'necessity' be appealed to as excuse or justification, it must be shown to have sprung out of the circumstances that are alleged to have invoked it." (Italics ours.)

Again, at page 406, the court said:

> "Such a doctrine is subversive of all civil rights, and places the civil authorities in absolute subordination to the military. In *Colonel Mitchell's case*, 13 How., *supra*, the seizure of the goods, resulting in their ulterior loss, was made in the enemy's country. Yet he was held to be a tort-feasor, because the goods were not at the time exposed to capture by the Mexican army, and were not taken to be used in his own military operations. It was put upon Mitchell to show the one state of facts or the other, in justification."

Just as here it must be shown by evidence.
Further it was said:

> "It was not referred to an officer commanding military operations to judge finally and conclusively of the necessity of the seizure of the property of a citizen, lawfully with his property at that place; with less reason can it be claimed that General Tucker, who was commanding in this State, could, at his discretion, destroy the property of a citizen; and with the more force does the argument press upon him to show his right. * * *
>
> "When the plaintiff's whisky was destroyed, active hostilities had ceased; all the Confederate armies east of the Mississippi River had surrendered, and the whisky was not exposed to capture, nor could it have been necessary to General Tucker's military uses. But, more than this, martial law did not prevail, nor did there exist that state of things in which it could rightfully exist.
>
> "But the authorities, to which we have referred, distinctly announce the doctrine that in flagrant war power does not belong to a military officer, merely as such, to take or to destroy the property of the citizen, unless a necessity exists to apply it to military purposes, or to prevent its capture by the enemy. * * *
>
> "The authorities teach the further doctrine, that military orders do not protect and justify an invasion of private property, either in war or in time of peace, if done without the warrant of the law, applicable to the one State or the other."

See, also, *Farmer v. Lewis*, 1 Bush., 96, especially note thereto; 89 Am. Dec., 610. See, also, note, 65 L. R. A., 193; note, *County v. Rankin*, 2 Duvall, 502; 87 Am. Dec., 505; 45 L. R. A. (N. S.), 996; see, also, *State v. Brown*, Annotated Cases, 1914C, page 1, note thereto. Note that the court in these cases tried the facts with reference to property without influence by the declarations of any one.

In virtue of the alleged war power, the civil authorities have seen fit here to confiscate, not all of appellants' property.

but just so much thereof as to them seem proper—that is to say, that portion of the value thereof in excess of the original cost, plus an arbitrary margin of profit. The war power never could have been so integrated into a taking of property. It justified the taking, for the carrying on of the war, under proper circumstances, of all the property, but it did not extend to the taking of such portions as are here sought to be destroyed, under these circumstances. This war power is required to be exercised subject to the Fifth Amendment (*Hamilton v. Distilleries*, 251 U. S., 146).

We have presented a foreign war, when property in the United States is sought to be taken for less than its value, under a statute passed in virtue of the alleged war power.

If this fixation be held to be but a departmental construction, then such departure will warrant injunction against the officer who has so transgressed constitutional authority.

But we submit that under the war power private property in the United States did not become, when it consisted of the character of property whereof appellants were possessed, affected with a war use so as to authorize its destruction, or partial destruction, by any instrumentality, military or civil.

The plea is that war beyond the seas operates to vest power to take private property of a citizen in this country. Upon this proposition we squarely join issue as to the validity of the Government's act, so far as it affects property belonging to an individual sought to be taken, without compensation therefor; not for the benefit of the United States, but for the benefit of some other citizen, neither person being in the service of the Government at the time.

This is not an exercise of martial law, or of military law, by any stretch of the imagination, but is the suspension of a constitutional guaranty in time of local peace by the existence of foreign war. Power to declare war necessarily involved a foreign power against whom such war was to be declared, and the waging of war is in civilized times against such

foreign power and not against the property of citizens of the State which has declared such war.

In short, the declaration is against the enemy, and not those from whom our soldiers must be recruited. Their private property remains property, subject to all the constitutional guaranties, and as such cannot be taken without compliance with the constitutional requirements. The only time or place when private property can be taken under the war power is (1) in the place where war is flagrant; (2) at the time when war is flagrant; (3) by a person acting under military authority; (4) when such taking is directly promotive of the welfare of the waging of the war.

All of these methods have been laid down expressly by the decisions cited above, and their application to the Lever Law demonstrates its invalidity, when thereby property is taken, not for the benefit of the Government, but for the benefit of an individual.

Constitutional guaranties have ceased to exist; if the military power, as held in *Hamilton v. Distilleries, supra*, is enabled to take that which is private property for the benefit not of the United States, and it is truly impotent when such property is sought to be utilized by the United States for purely private purposes, taken from one to be given to another.

But it may be said that the Lever Law affects only excessive prices, and that the departmental construction, concurred in by some of the lower Federal courts, is erroneous. But, be that as it may, this law as now enforced seeks Federal regulation of intrastate transactions with personal property, wherever the United States has no further authority than that conferred by the Constitution, and the necessity for its act cannot extend its authority to the displacement of the State's power in the premises.

It seems to be overlooked that the United States has but a delegated function in the premises; that its acts are limited and circumscribed, and yet the war power, while supreme,

does not supersede State existence, and over the ordinary affairs the State still, under the Ninth and Tenth Amendments, must exercise their reserved power.

Should it for a moment be held that personal private property constitutes a subject for confiscation during war periods from one citizen for another citizen, then our boasted civilization has assumed an attitude which differs nothing from the Russian Soviet.

Under the Constitution, these guaranties are intended to be substantial; they are declared to be the supreme law of the land; and yet, in America, shall it be, as during the time of Cæsars, that our forms of freedom persist while their substance has departed?

All of the nations against whom war was declared by us and our allies are now at peace, the treaty with Turkey having just been signed, and under the war power we have now admittedly a state of peace. A treaty has not been signed, and how far the provisions of the Constitution are a limitation upon the treaty-making powers was left an open question in *Missouri v. Holland*, — U. S., —; Adv. Shts., 461; but, being a government of delegated powers, the exercise of the power must be in virtue of the delegation, and, so being, must concur with all provisions of the instrument whereunder the exercise is made. The States would never have assented to any such exercise if it had been surmised that under the treaty power the safeguards, otherwise created, could have been for naught held. The Constitution does not sleep, and thereunder the President and Senate are without power to deprive any person of property without due process of law, or to perpetuate unconstitutional personal discriminations which are now extant only in virtue of the dispute incident to the League of Nations.

Peace, Constitutionally and in Fact, Exists.

Under the Constitution, the President is charged with the enforcement of the law, and for a violation thereof is per-

sonally responsible to the person wronged. There is no sanctity attached to his actions, and, with deference, we submit that a fiction cannot be made to indefinitely postpone an admitted fact, wherein invidious personal privileges are projected and private property subordinated to personal prerogatives.

As to the existence of the war, it was classed in *United States v. Dry Goods Company*, 264 Fed., 218, "as passed into history, and is little more than a memory," and in *Hardware Co. v. Hoyle*, 263 Fed., 137, as a "fiction." This status was seen from the judicial branch.

From the executive branch we have proclamations without number setting forth as a fact that peace was with us, and therefor giving thanks.

From the legislative department we have a resolution passed wherein the peace status was defined.

In addition to these governmental declarations, we have it from a practical point of view that we are alone following the pursuits of peace, burdened withal by the obligations of war, whose temple may be closed by conduct just as effectually as by proclamation.

The Constitution expressly provides by whom war may be declared; it hedges about its declaration numerous restrictions, found requisite by the wisdom of the ages to protect a free people. *The Constitution fails to provide by whom peace is to be declared.* There is conferred the power to make a treaty upon the President and the Senate; there is conferred the right to pass laws upon the Congress, but when it comes to making peace, there is no exclusive method therefor by the Constitution provided. There is no prohibition against it being declared by the law of the land when it exists in fact. The Constitution is the supreme law of the land, and when under it rights are given, whose existence has been judicially ascertained, does not the Constitution impose the duty upon this court to declare that which is known to all men?

The Constitution is without restriction upon bringing into being the blessings of peace—the elimination of war by the restoration of law. As the keeper of the law, the non-delegable duty rests upon this court to recognize the operation of that instrusted by the Constitution, namely, to take judicial notice of the fact of the existence of war. Why not of peace?

We appreciate and have read and reread the decisions of this court with reference to the exercise of the co-ordinate constitutional powers by the President, the Congress, and this court; but, after such examination, we submit there never has been a time in the history of this Republic where all of our Allies are at peace, in theory and in fact; the enemy upon which war was declared has ceased to be; portions of its territory allocated to our Allies, and the commercial intercourse being had almost as if war had not been, and yet, a state of war, theoretically, is said to exist.

As pointed out by Halleck (*International Law,* 845), the power that is vested with the power to declare war is not necessarily the same power as is vested with the right to declare peace (citing several historical cases). So, while it may be that Congress can declare war, and the President bring it on in case of civil strife or invasion, it does not therefore follow that under the present judicially known conditions, with reference, not to foreign nations, but as to citizens of the United States, located in the city of Jackson, in reference to their private property, this court could not give effect to the Constitution.

Note the decision in *Prize Cases* (2 Black, 666), where war is defined, the course as to civil war pointed out, and it then declared:

> "As a civil war is never publicly proclaimed, *eo nomine,* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know."

And further:

> "If a war be made by invasion of a foreign nation, the President is not only authorized, but bound, to resist force with force. * * * And, whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (*The Eliza Ann,* 1 Dod., 247) observes: 'It is not the less war on that account, for war may exist without declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge, to be accepted or refused at pleasure by the other.'"

Thus, as to the beginning of the war, it appears to be a question whereof this court can take judicial notice; and, if so, surely its duty to thereby preserve the Constitution is supreme.

As to the termination of a war, like circumstances may exist; but in *The Protector,* 12 Wall., 701, it was, among other things, said:

> "Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated."

The court then makes reference to the two proclamations of the President, and concludes the opinion thus:

> "In the absence of more certain *criteria,* of equally general application, we must take the dates of these proclamations as ascertaining the commencement and close of the war in the States mentioned in them."

Thus showing that the matter was a fact to be determined, and we submit that those factors hereinbefore set forth show

that it has terminated. And, having terminated, there is no longer the power in the President to exercise legislative powers by projecting his will into law by failing to declare the obvious. Does not this law at this date derive its sole validity from a failure to declare what we all know? And, if so, is not this act in so failing to declare a condition, known of all men, the exercise of legislative power by the President contrary to the terms of the Constitution?

The duty to preserve the peace is stated strongly by Vattel (*Law of Nations*, 430), and the duty to recognize as existing is equally paramount.

We recognize the fact that some of the lower Federal courts have attributed to this court the duty blindly to follow the proclamation of the political department (*Hamilton v. McClaghty*, 136 Fed., 449; *United States v. 129 Packages*, 27 Fed. Cas., 289, and cases collected); but all of these had to do with external relations, political relations as such, and did not embrace the case where private property was being taken in the country where war had never been flagrant. This is not a political question; it is a property question, and, as such, the Constitution is binding upon all persons who may be depositories thereunder (*Telephone Co. v. Los Angeles, supra*). Note with what exactness the powers of war and pertaining thereto are circumscribed in Congress, and if the Constitution expressly left the right unvested, but did prohibit taking property without due process, would not this court follow that, which the court would have a right to determine and which was a condition precedent to the performance of the constitutionally imposed obligation?

In *Hall, International Law* (6th edition), 559, it is declared:

> "The termination of war by simple cessation of hostilities is extremely rare. Possibly the commonly cited case of the war between Sweden and Poland, which ceased in this manner in 1716, is the only unequivocal instance, though it is likely that if anything

had occurred to compel the setting up of distinct relations of some kind between Spain and her revolted colonies in America during the long period which elapsed between the establishment of their independence and their recognition of the mother country it would have been found that the existence of peace was tacitly assumed. No active hostilities appear to have been carried on later than the year 1825, and no effort

made to hold neutral States or individuals to the obligations imposed by a state of war; but it was not till 1840 that intercourse with any of the Central or South American republics, except Mexico, was authorized by the Spanish Government. In that year commercial vessels of the Republic of Ecuador were admitted by royal decree into the ports of the kingdom, and at various subsequent times like decrees were issued in favor of the remaining States. It was only, however, in 1844, three years after commercial relations had been established, that Chile, which was the earliest of the republics, except Mexico, to receive recognition, was formally acknowledged to be independent; and Venezuela, which was the last, was not recognized till 1850.

"The inconvenience of such a state of things is evident. When war dies insensibly out, the date of its termination is necessarily uncertain. During a considerable time the belligerent States and their subjects must be doubtful as to the light in which they are regarded by the other party to the war, and neutral States and individuals must be equally doubtful as to the extent of their rights and obligations. Nevertheless a time must come, sooner or later, at which it is clear that a state of peace has supervened upon that of war. When this had arrived, the effects of the informal establishment of peace are identical with those general effects consequent upon the existence of a state of peace."

In Halleck, *Int. Law and Laws of War*, 844, it is said:

"It has been laid down as an unquestionable proposition of international law, that there is a legal as well

as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease. Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured, it should cease. The obligation to accept a peace sufficiently safe is also strenuously argued by Grotius. Other writers say that when, by use of the legal means of war, the invaded right has been obtained or secured, the injury redressed, or the threatened danger averted, the *abnormal* state of war *must* cease, and the *normal* state of peace *must* be re-established. Some, who advocate the general right of external intervention, deem it a most proper occasion to exercise that right when a war, though lawfully begun, is unlawfully continued beyond the just objects of its inception. There are three ways by which a war may be concluded and peace restored: 1st, by the unconditional submission of one belligerent to another; 2d, by a *de facto* cessation of hostilities and a *de facto* renewal of the relations of peace by both belligerents; and, 3d, by a formal treaty of peace."

Prior to the enactment of the Constitution, war had thus terminated; with this knowledge, the learned men who framed that instrument, after making the most minute provisions relative to the institution of war, the limitation of its powers, the amelioration of its horrors, failed to provide how peace might be concluded. This failure is extremely significant, and as a part of the duty of this court, there is the paramount obligation that no property be taken without due process of law. Now, with an actual state of peace existing, could Congress exercise the war power by reason of a state of war that had theretofore existed? The duty to recognize the normal is the paramount duty of the nation. We submit that the coming of peace was not provided for, because when it came its blessings permeated the entire nation, and no man-made proclamation was requisite of the highest gift of God.

The power to recognize peace is not specifically allocated under the Constitution. Being expressly not assigned, did this divest this court of the power to obey the supreme law of the land in virtue of that which is now a "fiction," a "memory"?

War has terminated in this manner under the law of nations, and is it competent for this court to continue to burden the property of the people with that which, if it existed, was only in virtue of the war power? Can this court fail to appreciate the transition from law to the lack of it—war?

When peace has thus come in a constitutional manner, the Constitution, as the supreme law, limits the power of Congress by facts, not by fictions; by what is, the present; not by what was, history.

But it may be said that there has been no proclamation by the President; that therefore law has not come into its own by the end of war. Not so; the war power ends with the war. Peace, actual peace, devitalizes any exercise of the war power.

With greatest deference, and having before us only the duty of supporting the Constitution, we submit to the court that technical as well as actual peace is at hand. We have carefully noted the disinclination of this court to decide other than judicial questions; how admirably this court has coordinated the several functions of the Federal Government by its strict adherence to its own well-appointed course.

But all that any one claims to keep the United States at war, and not at peace, is the League of Nations, embodied in the Treaty by the President in the exact form that it was his pleasure to have it there imbedded. Had there been no such league, then technical and actual peace would surely have been coincident. Can, therefore, technical war suspend actual peace in virtue of a disagreement over the League? Can the property of appellants be taken in virtue of an alleged technical war when there is no war?

We do not seek to discuss the propriety, *vel non*, of entering the League by the signing of the Treaty. We insist upon basing the law upon conformity to the Constitution, such being the paramount duty of both the President and the Senate. We are sure neither desires aught else.

But if it be that the execution of the treaty, as to the League, by disagreement is, under the Constitution, to be defeated, due to the peculiar status of the powers of the President and Senate, it would be the duty of this court to declare that, irrespective of the execution of the Treaty, as a matter of law, peace existed and that a state of war did not exist.

That this declaration should precede the signing, we insist, if it is clearly demonstrable that the failure so to do would violate property rights under the Constitution.

We affirm that actual peace exists, and that the only fact that separates the Senate and the President in said Treaty is the League of Nations.

The status of technical war, or actual peace, ranges about this one point: If that League should be unconstitutional and be so held by this court, we are certain that both President and Senate would acquiesce. We deny the right to project technical war into actual peace by those instrumentalities, both subordinate to the Constitution, when the question of difference is the validity of a provision, extraneous to the rights of appellants. In short, in virtue of the assertion of an unconstitutional power, can technical war be projected to take appellants' property without due process of law?

The sole reason technical war still endeavors to persist, and why peace, actually here, is not recognized by the President, is a difference *in obligations for the future*, not for the present, in the League of Nations; and as public acts of both declare and show peace, it, at least, is a fact. If it be found that the formation of such a League is beyond the power of the President without the Senate's concurrence, then, with deference, we submit that it is competent for this court to assert the Constitution as the supreme law of the land, and to

vouchsafe to the citizens the protection thereunder guaranteed, when their rights are unconstitutionally invaded.

It may be said that this request borders upon an assumption of political power by the court. This is incorrect, for when it becomes the duty of this court to protect private property against unconstitutional impairment, then the exercise of that function is judicial.

The history of the war and the controversy as to Article X of the League are all well known, and had there not been a League, there is no question but that peace would now exist in theory as well as in fact. The question is, how far the President, pursuing what we shall endeavor to show to be an unconstitutional prerogative, can impair the rights inherent in the States and in their citizens.

League of Nations Not Constitutionally Within Purview of Treaty-making Power.

By section 4, Article IV, of the Constitution it is declared that the United States shall guarantee to every State in this Union a republican form of government.

By the Ninth Amendment it is declared that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; and by the Tenth Amendment it is declared that the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. These provisions are in addition to the mandates hereinbefore discussed, and bring up the question whether under the power to declare war an alleged state of war can be, contrary to the admitted fact, continued to the detriment of those who are by the Constitution vouchsafed rights thereunder, by the attempt to make a treaty in conflict with the Constitution at one point.

It must be admitted that it was the duty of the Senate and the President to have, when war ceased, relinquished those

prerogatives cheerfully acquiesced in by the people for the general welfare, but which were not possessed, when all know that the exigencies wherefor they were given have now finally terminated.

The proposition we submit is that the duty is imposed upon this court to see that the rights vouchsafed under the Constitution are not denied by an impassibility, unconstitutionally created, and whereby rights given by the Constitution are taken away by the personal actions of those who are charged with the administration of the law.

Can those charged with the performance of a function indefinitely assume to project that function when the cause for the discharge of such function has terminated, especially when such claim is solely based upon an unconstitutional predicate?

The President and the Senate are agencies for conducting the war; but when war has ceased, they are not an agency for depriving the people of those rights which the Constitution says they possess.

The President has seen fit to insist upon the acceptance, almost literally, of the Versailles Treaty, wherein was integrated the League of Nations, constituting the United States, under Article X thereof, but an instrumentality for the further prosecution of the wars now raging, and for the further financing of those small dependencies magnified into governments by force other than their own initiative. The wisdom of remaining out of the League of Nations, or going into the League of Nations, is not the question which we desire to present. No official or officials can, contrary to the Constitution, project a condition, under which personal government is perpetuated, in virtue of a usurpation of a right not constitutionally possessed.

Under *Hamilton v. Distilleries*, 251 U. S., 146, we submit that the power was confined to the making of a treaty, not abrogating any of the constitutional duties, nor integrating obligations which were outside of the functions thereunder brought into being.

It has been claimed that Article X imposes only a moral obligation. But with the people of these United States a moral obligation resulted in the Civil War; a moral obligation resulted in the Spanish War; a moral obligation resulted in the World War, and the transition from a moral obligation to a legal duty is not hard when the authority of the United States in the premises is being denied. And the creation of the status, so transforming, is one of those functions which has been delegated to the League, and as to which the United States ceases to be an independent sovereign.

But it is said that Article X has no such efficacy; that it was not to add to the burdens to be borne, but merely to be an instrument under which Congress would continue to exercise its constitutional functions; that Congress would still have the right to declare war, and that, therefore, we would be perfectly safe in entering where the declaration must be made by our own constitutional agencies.

The partisans of the Treaty proclaim that under it no unconstitutional obligation as to waging war is made. The duties assumed under the League would, in the instances thereunder specified, make the declaration follow as a matter of course. But there is no need for a declaration of war by Congress. If the United States does those things therein provided, war may be begun against it by the party who is sought to be coerced; a declaration of war is not a prerequisite to end of the reign of law. (See *Prize Cases*, 2 Black, 667.) War may be brought upon this nation without Congress doing more than ceasing to act, if in virtue of the duties assumed under the League we were to furnish aid to a State who had the right to demand it thereunder.

With deference, such, we submit, is the meaning of the Treaty, and, more, such is the interpretation of those who, with him, framed it.

Look at Poland, which makes an unwarranted attack upon Russia, and, as said last week (written August 20) by Lloyd-George to Parliament, "In spite of warnings from both

England and France." He further declared that in the terms of peace the Petrograd government would be entitled to take these factors into consideration, but that the Allies would continue to urge Poland to accept the terms of Russia, "Always supposing the continued independence of Poland is recognized in those terms." He further set forth to Parliament that if Poland did not accept those terms, "Having regard to military position the Soviets are entitled to exact, she could not be supported." But who is to pass upon what terms Soviets are entitled to exact; their declarations are openly that treaties are made but to be violated for advantage. Here, therefore, with an enemy of this type, we would, as a minority nation, be called upon to say what terms should or should not be accepted. Suppose that we were, as a minority, overruled, and thereupon complied and supplied aid and comfort to Poland in virtue of the decision for us made by the League, where would the state of peace be? Where, under the Constitution of the United States, is there any authority in the President, or any one else, to sit in judgment to determine whether terms offered to an aggressor nation are fair and reasonable? What would be said of the United States if the Congress would not declare war, after participation in all of the deliberations?

Lloyd-George was a party to the building of this Treaty; he should know what it means; and he defined to war-weary England, in the face of the threatened strike by the workers, what obligations had been assumed. He did not limit them to mere promises, but insisted upon performance.

The Premier declares to Parliament that the covenant entered into by the nations in the Peace Treaty *"depends upon the nations signing that treaty banding themselves together to defend those of their members who cannot defend themselves,"* and that England and France then were *"morally bound to interest ourselves"* in the case of an ally *"in the event of its national existence being endangered."* But this held, he declared, *"if the emergency were to come, would*

be in supplies, transport, artillery, and co-operation by experienced Allied commanders." But if these were insufficient, what next? It is true that he declares against sending armies; but if it has gone so far as that, where would we stop. It takes two to start a fight, but likewise it takes two to end it. We have no power to compel, when war supersedes law, the winning adversary to withdraw when we are losing.

Another aspect:

There can be no delegation of a delegated power, and the integration of the League of Nations would result into a suspension of the functions constitutionally imposed by the creation of the United States Government. That a superstate would be created has been shown; but whether that superstate could be constitutionally created without an amendment to the Federal Constitution is a matter which, we submit, requires at this time a decision by this court.

If we should enter into the League of Nations, a mere treaty-making power would invest the Government with these well-stated additional duties:

> "A treaty does preserve solidarity; an understanding, association for a common object, alliance of independent factors, may preserve solidarity; but how can a nation, even under such an interpretation of its powers, enter into a covenant with other States of the world to create an entity with governmental powers, even with limitations, to rule over other States of the world without consenting to such partial rule being extended over itself? And whether or not this membership implies surrender of sovereignty, it certainly extends sovereignty over others, and by so much as the exercise of voting power inside the League affects the independence and solidarity of other nations.
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> * * *
>
> "In short, the League of Nations in functioning must have before it the ideal of a democratized world consisting of democratized States, themselves independent, or it is at once at war with itself. Has it such an ideal imbedded in its covenant? If it has,

then must it not proceed to undo the bonds of all empires? If it has not such an ideal in its constitution, then must not its functioning respond to the will of a majority of the States of the world as they are now constituted and to the League powers they exert inside the League? And, if so, and empires predominate in such power, then must not imperialism become the League dream and not democracies? And in consequence will we not find the States of the world drifting into compacted powers little different from those old alliances resting on the 'balance of power?'

* * *

"Again, foreign relations, through treaty-making, were placed in one division of the Government with and by the consent and advice of another, the Executive and Senate. In entering into a league, extending the Government of the Republic over other governments, though in limited degree, there is no provision in the Constitution, and none proposed, by which commissioners (though elected by the people) can be empowered to represent the United States by voting in the League. Though through a treaty a league may be born, the treaty-making Executive and Senate cannot therefore and thereafter sit in the Council of the League and thus represent the people of the United States therein. Under our Constitution as it stands, the President or Executive can no more assume to sit in the League as a sovereign representative of the United States than he can assume to sit in the council chamber of a foreign republic or assume to recommend to a foreign nation what laws it shall make. Treaty-making as a means of establishing and participating in a league is dead with a league in existence, and the executive is as far from it as the citizen.

"More than this the extension of the governmental power to the extent of participating in world movements and voting on foreign relations (especially those in which our own nation is *not* involved) so removes representative government from its source in the people as to almost, if not quite, constitute a species of autocracy not directed by or responsible to the

> people themselves. The citizen who holds fast to the Constitution, who is a strict constructionist, who believes in limitations on governments and in consent of the governed, must answer for himself whether or not this whole process is wrong in inception and execution, and whether or not it is tantamount to sending the United States forth as a crusader for a dream, and by allowing it to sit in a Council of a League, armoring it with force to accomplish that dream, and to coerce, if not by military means, then by super-civil means, this dream-conception to dominion over others"—(*The Commercial and Financial Chronicle*, July 24, 1920, pages 330-331).

Wherefore this admitted assertion of the President is without, with deference, we submit, sanction of the Constitution, and he has, therefore, in virtue of an unconstitutional assumption of power, assumed to project personal rule incident to the exercise of a war power through a peace period. The creation of a personal domination, through a failure to conform to Federal constitutional limitations, calls for interposition upon the part of the keeper of the palladium of our liberties. Must not this court say, when peace is affirmed by one and denied by another upon a specific ground alone, whether that ground is constitutionally tenable? That the treaty-making power does not embrace the surrender of our individuality as a nation, the imposition upon us as a people of acting for those who have been recently endowed by superior force with national entities, who in virtue of such are forthwith proceeding to demonstrate their incapacity for self-government by attacking others. Can we thus be ruled by a personal superior when it is known of all men that the source of his power consists in a failure to subscribe to that to which he is bound to conform?

It may be that the peace with Germany affects very few citizens of the United States. The fraction of our commodities sent to that nation compared with our internal commerce is infinitesimal; and yet, in virtue of the infinitesimal busi-

ness that would move between Germany and the United States with peace officially declared, the President has assumed to retain the war prerogatives over our internal affairs in virtue of a power which, with deference, furnishes no such authority, and to subordinate our personal liberties to a gratification of a consummation to be attained by the creation of an unconstitutional status.

As a free people, we submit that we are entitled to appeal to this court to set forth the limitations which may be occupied by the President in the bringing of peace, so that we may not again be held up to the world as lacking in good faith because our Chief Executive overstepped his constitutional bounds.

The duty ordinarily not to interpose, we admit; but where, as in this instance, a failure so to protect private property committed irretrievably to the protection of this court would thus fail, we insist that the limitation upon the President's power should be declared and the impassibility thereby unconstitutionally established be constitutionally dissolved.

Wherefore we respectfully submit that the Lever Act should be declared unconstitutional, and, if constitutional when passed, it cannot now, in peace, be enforced, and that proper restraining orders should be issued. But, if declared constitutional, the decree should, nevertheless, be reversed and proper restraining orders granted to vouchsafe those fundamental rights which are being frittered away by the departmental edict of one unclothed with constitutional authority to do those things by him sought to be done.

Respectfully submitted,

MARCELLUS GREEN,
GARNER WYNN GREEN,
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Of Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

R. E. KENNINGTON ET AL., APPELLANTS,
v.
A. MITCHELL PALMER ET AL., APPELLEES.
No. 367.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, JACKSON DIVISION, SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLEES.

This is an appeal from a decree of the District Court declining to enjoin a United States district attorney from prosecuting the appellants for violations of section 4 of the Act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the Act of October 22, 1919 (41 Stat., 1st session, c. 80, p. 297).

STATEMENT OF THE CASE.

The appellants, who are merchants dealing in wearing apparel, filed their bill seeking an injunction to restrain prosecutions against them on the charge that they were making unjust and unreasonable rates or charges in handling or dealing in necessaries, to wit, wearing apparel. The bill states, with much

detail, the manner in which appellants do business. Without now going into details, it is sufficient to say that the bill explains elaborately the things which appellants' claim must be taken into consideration in fixing just and reasonable prices for their wearing apparel. It is then alleged, in substance, that, while neither the President nor any one acting by his authority has fixed the price at which appellants' wearing apparel shall be sold, officials of the Department of Justice, acting through what are called fair-price committees, have adopted a schedule of prices and margins of profit as applicable to such goods, and appellants have been notified that sales of goods at prices in excess of this schedule will be regarded by the United States district attorney as unjust and unreasonable and will be prosecuted as violations of the Act of October 22, 1919. That Act itself is then assailed as unconstitutional, because (1) no state of war existed as a matter of fact between the United States and Germany and her allies at the time of the passage of the Act; (2) wearing apparel bore no relation to such state of war as may have existed on the 22d day of October, 1919, or at any time since so as to confer upon Congress authority to regulate the prices thereof; (3) section 2 of the Act of October 22, 1919, which makes it a criminal offense to make any unjust or unreasonable charge in handling or dealing in necessaries, does not define the offense thereby denounced as a crime, but leaves the definition thereof to the judgment and consciences of judges and juries in trials after the fact, and is therefore an *ex post facto*

law in conflict with Article I, section 9, subdivision 3, of the Constitution of the United States; (4) the Act is also unconstitutional because in conflict with and prohibited by the Sixth Amendment to the Constitution, in that no one accused of a violation of the Act in so far as it relates to wearing apparel or the rates charged or prices made or exacted in handling or dealing in the same is or can be informed of the nature or cause of the accusation against him, and no one at the time of the act which forms the basis of the charge can by any possibility determine whether he is or is not violating such statute; (5) the Act is unconstitutional because it excepts from its operation farmers and certain others. Some other objections were made to the Act, but, since they are not now presented in the brief filed, need not be noticed.

RULING OF THE COURT BELOW.

The District Court, without an opinion, dismissed the bill, the decree reciting that the court was of opinion that the plaintiffs had a plain, adequate, and complete remedy at law, and that for this reason alone they were not entitled further to proceed in this cause.

BRIEF.

I.

No injunction could properly issue unless the act under which appellants were about to be prosecuted was found to be unconstitutional.

In the brief filed in this court the only ground upon which the right to an injunction is assailed is the

unconstitutionality of the acts of Congress involved. Plainly this is the only ground upon which such a right to enjoin criminal prosecutions could be predicated. It is unnecessary, therefore, to consider those portions of the bill which present merely controversies between the appellants and Federal authorities as to the proper meaning and construction of the act, and we may pass at once to the constitutional questions raised.

II.

The Government's contention as to these constitutional questions have been fully presented in briefs filed in cases No. 324, United States v. L. Cohen Grocery Company, and No. 357, Harry B. Tedrow, United States District Attorney for Colorado, v. A. T. Lewis & Son Dry Goods Company.

All the constitutional questions now raised are involved in one or the other, or both, of the cases of *United States* v. *L. Cohen Grocery Company*, No. 324 on the docket of this court, and *Harry B. Tedrow, United States District Attorney for the District of Colorado*, v. *A. T. Lewis & Son Dry Goods Company*, No. 357 on the docket of this court, which have been set for hearing contemporaneously with this case. The Government's contentions have been fully presented in the briefs filed in those cases, and it is not deemed necessary to repeat here the arguments there advanced. Hence, only such reply to the arguments contained in appellants' brief will be made as may be deemed necessary to supplement what has been said in the other cases mentioned.

III.

The Lever Act, as amended, does not take private property within the meaning of the constitutional provision against taking such property without due compensation.

It is contended that the effect of this Act is to take private property without making compensation therefor, and hence that it is void. This contention is based upon a misconception of the nature of the law. It does not purport to take and does not take the property of any one. It is merely the exertion of police powers as incident to the war powers of Congress. If it is a valid law at all, it is so because of the governmental power which authorizes "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." *Munn* v. *Illinois*, 94 U. S. 113, 124. It simply says that, under the stress of war conditions, no citizen shall so conduct himself or use his property, by extorting unreasonable charges for necessaries in which he deals or for his services in handling such necessaries, as to injure his Government or the public as a whole, upon whom the Government must depend for the successful prosecution of the war. The constitutional provision against taking property without compensation has no relation whatever to the lawful exercise of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264. The sole inquiry, therefore, is whether the statutes in ques-

tion are the result of a lawful exertion of the police power.

IV.

When the Act of October 22, 1919, was passed, Congress was in full possession of its war powers.

It is next insisted that, although Congress was authorized to exert its war powers in 1917, when the Lever Act was passed, the emergency calling forth those powers had passed before the passage of the Act of October 22, 1919, which, for the first time, included wearing apparel in the definition of necessaries and made the selling of necessaries at an unreasonable price a criminal offense. This question would seem to be completely foreclosed. The Act in question was passed six days before the National Prohibition Act. If, therefore, the war powers were available for the passage of the latter Act, they were undoubtedly available for the passage of the former. The specific objections now made to the Act of October 22, 1919, were made against the National Prohibition Act. This court, however, held that, on October 28, 1919, Congress was in the full possession of its war powers and was itself the judge of the extent to which it was necessary to exert them, and that hence the National Prohibition Act passed on that date was valid, and also that the earlier Prohibition Act of November 21, 1918, which, by its terms, was to end with the termination of the war and the completion of demobilization had not ceased to be effective. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 163;

Jacob Ruppert v. *Caffey*, 251 U. S. 264, 281–2. Exactly the same conditions with respect to war existed when the present Act was passed on October 22, 1919. At that time, as pointed out by Mr. Justice McReynolds in his dissenting opinion in the *Jacob Ruppert* case, demobilization of the armies was practically and substantially complete. No material changes in war conditions have occurred since.

The present Act, by its terms, is operative until peace shall have been ascertained and proclaimed by the President. It is, of course, conceded that this statute involves the exertion of police powers which would ordinarily belong to the States and not to the Federal Government. Their exertion in this case by Congress is justified alone upon the ground that such exertion is a necessary incident to the full exercise of the war powers of Congress. This being true, for war purposes, Congress may exert such powers to the full extent that any other Government could exert them. We have shown in the brief for the Government in the case of *United States* v. *L. Cohen Grocery Co.*, No. 324 on the docket of this court, that the things required by this Act are within the inherent functions of Government. The argument to that effect will not now be repeated. It is supported by the case of *Munn* v. *Illinois*, 94 U. S. 113, and the cases following and commenting on that case.

We call attention to the fact that counsel in their brief have quoted from the opinion of Mr. Justice Field in *Munn* v. *Illinois*, *supra*, and have inadvertently referred to him as speaking for the

court, when, in fact, his opinion was a dissenting opinion. It is worthy of comment, however, that the language quoted from the learned Justice in his dissenting opinion clearly defines the scope and effect of the opinion of the court as laying down a rule that fully supports legislation of the kind now under consideration.

V.

The act of October 22, 1919, is not too vague and uncertain to form the basis of a criminal prosecution.

This question has been fully discussed in the Government's brief in the case of *United States* v. *L. Cohen Grocery Co.*, No. 324, which will be heard contemporaneously with this case. It is not now necessary, therefore, to repeat that argument. It may be said that among the many cases cited in support of appellants' contention there are some which it is difficult to distinguish from this case. There are some which perhaps can not be distinguished. But in so far as any of these cases are not distinguishable from the present case, they are equally undistinguishable from the case of *Nash* v. *United States*, 229 U. S. 373, which it is respectfully submitted establishes the validity of the present law as against this particular objection.

VI.

The exclusion of farmers and certain others from the operation of the act of October 22, 1919, is not an arbitrary classification and does not render the Act void.

The contention in this case that the Act is unconstitutional because the exclusion of farmers and others from its operation is an arbitrary classification is supported in the brief solely by the citation of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The Government's argument in answer to this contention is fully presented in its brief in No. 357, *Harry B. Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, and need not now be repeated.

VII.

There is no contention that a mere failure to conform to prices fixed by a fair-price committee can be made the basis of a criminal prosecution.

The Government does not contend, for a moment, that a criminal offense can be established by simply showing that a merchant has failed to conform to prices fixed by fair-price commissioners. The bill itself shows that no prices have been fixed by the President or in the exercise of any authority committed to him. The so-called fair-price committees were used by the Department of Justice for the purpose of gathering information and data upon which the prosecuting officers of the Department could base a judgment as to what prices were reasonable in preparing to enforce the law by prosecution. They

served the further purpose, by publishing results of their investigation, of giving notice to merchants at what prices they could sell without having to defend a criminal prosecution. In other words, such merchants were thus notified that the Department of Justice was prepared to endeavor to show in court that certain prices, if exacted, would be unreasonable and therefore criminal. But the Government would never have thought of charging in an indictment merely that the prices so approved by the fair-price committees or the district attorney had not been complied with. The charge would have been that the prices exacted were unjust and unreasonable and therefore a violation of the law itself.

CONCLUSION.

It is respectfully submitted that the Act in question is not subject to any constitutional objections and that the decree denying the injunction and dismissing the bill was right and should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

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KENNINGTON ET AL. v. PALMER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 367. Argued October 19, 20, 1920.—Decided February 28, 1921.

1. Decided, as to the unconstitutionality of part of the Food Control Act, upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
2. Equity will enjoin criminal prosecutions threatened under a void statute, the legal remedy being inadequate.

Reversed.

BILL to enjoin criminal prosecutions against dealers in wearing apparel under § 4 of the Food Control Act.

Mr. Garner Wynn Green, with whom *Mr. Marcellus Green* and *Mr. Wm. H. Watkins* were on the briefs, for appellants.

The Solicitor General, for appellees, in addition to the points presented in the preceding cases, argued that the act does not take property without due process of law. There was no contention that a mere failure to conform to prices fixed by a fair-price committee can be made the basis of a criminal prosecution.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellants, dealers in wearing apparel in the city of Jackson, Mississippi, filed their bill in the court below against the Attorney General and subordinates charged by him with administrative duties under § 4 of the Lever

Act to enjoin the enforcement against them of provisions of that section. Their right to relief was based upon averments as to the unconstitutionality of the assailed provisions of the section, not only, in substance, upon the contentions which we have this day considered and disposed of in the *Cohen Grocery Co. Case, ante*, 81, but upon other grounds as well.

Without passing upon the question of constitutionality, the court dismissed the bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal.

As it is no longer open to deny that the averments of unconstitutionality which were relied upon, if well founded, justified equitable relief under the bill,[1] and because the opinion in the *Cohen Case* has conclusively settled that they were well founded, it follows that the court below was wrong and its decree must be and it is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE DAY took no part in the consideration or decision of this case.

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[1] *Wilson* v. *New*, 243 U. S. 332; *Adams* v. *Tanner*, 244 U. S. 590; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Ruppert* v. *Caffey*, 251 U. S. 264; *Ft. Smith & Western R. R. Co.* v. *Mills*, 253 U. S. 206.